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May 1

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HEARD AND DETERMINED IN THE

# S U P R E M E C O U R T

OF THE

STATE OF NEW YORK

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MARCOUS T. HUN, REPORTER.

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\* Appointed by the Governor, December 30, 1877, in place of George W. Rawson, deceased.

## ERRATA.

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In 12 Hun, page viii, strike out words "People v. Lord, 12-282, affirmed January 15, 1878."

In 10 Hun, page 311, for second line of head note, read "against an estate held by an executor jointly with others, where the same."



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# Cases

DETERMINED IN THE

## THIRD DEPARTMENT

AT

GENERAL TERM,

January, 1878.

ISAAC G. GALE, RESPONDENT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, APPELLANT.

13	1
74	287
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86	473

*Excessive damages — setting aside of verdict because of — Misconduct of juror — waiver of.*

This action was brought to recover damages for injuries sustained by the plaintiff while crossing one of defendant's tracks, and alleged to have been caused by its defective condition. Upon the trial it appeared that, prior to the accident, plaintiff had worked on a farm and could do any work connected therewith; that by the accident his right leg was broken near the hip; that he was confined to his bed from the time of the accident in July to October first; was placed in a special bed and his leg kept extended by proper appliances for eight weeks; that his right leg was one inch and a-half shorter than the other; that he could go over even ground with one crutch; and had mowed on a mowing-machine, raked with a horse-rake, and driven his team on the road somewhat, but was not able to do much farm work; that the injury was permanent and he could never recover therefrom. The jury rendered a verdict in his favor for \$14,000. *Held*, that the verdict would not be set aside as excessive.

During the trial, the court having adjourned, one of the jurors, who lived twelve miles from the court-house, asked the plaintiff to let him ride home with him. The plaintiff assented and the juror rode with him about ten miles, in a three-seated sleigh, plaintiff and the driver on the front seat, two other persons on the middle seat and the juror and another person on the back seat. Nothing was said about the trial. Subsequently, and before the testimony had been closed, the defendant's counsel became acquainted with these facts, whereupon plaintiff's counsel offered to allow this juror to be excused, if defendant's

counsel so desired. Defendant's counsel stated he was willing to leave it to the juror's sense of propriety whether he should or should not remain in the jury-box. *Held*, that even if the irregularity would, in any event, have justified the setting aside of the verdict, the acts and statements of the defendant's counsel constituted a waiver thereof.

APPEAL from an order at Special Term denying a motion for a new trial upon a case and exceptions and affidavits.

This action was brought to recover for injuries sustained by the plaintiff, by being thrown off his wagon, loaded with hay, when crossing the defendant's track at Coeymans, Albany county, in consequence of the breaking of his wagon wheel. Such breaking was alleged to have been caused by the negligence of the defendant in not keeping the surface of the ground, and the timbers and planks at the crossing, in good repair. The answer alleged that the crossing was in good repair and that plaintiff's injuries resulted from his own negligence.

The action came on for trial at the Albany Circuit, and resulted in a verdict for the plaintiff of \$14,000. The defendant moved for a new trial upon the grounds that the verdict was against evidence, and was excessive in amount; that errors were committed on the trial, and because of newly-discovered evidence, and for misconduct of one of the jury.

*Matthew Hale*, for the appellant. The authorities show beyond question that this verdict ought not to stand. (*McConnell v. Hampton*, 12 Johns., 234; *Collins v. Albany and Schenectady Railroad Company*, 12 Barb., 492; *Clapp v. Hudson River Railroad Company*, 19 id., 461; *Murray v. Hudson River Railroad Company*, 47 id., 196; *Tinney v. The New Jersey Steamboat Company*, 5 Lans., 507; *Peck v. New York Central and Hudson River Railroad Company*, 4 Hun, 236; *Cox v. New York Central and Hudson River Railroad Company*, 4 id., 176; *McIntyre v. New York Central*, 47 Barb., 515; *Chicago and Rock Island Railroad Company v. McKearn*, 40 Ill., 219, 237, 241; *Illinois Central Railroad Company v. Welch*, 52 id., 183; *Chicago and Alton Railroad Company v. Wilson*, 63 id., 167; *Goodna v. Oskosh*, 28 Wis., 300; *Spicer v. Chicago and Northwestern Railroad Company*, 29 id., 580; *Patton v. Same*, 32 id., 195.)

*E. Countryman*, for the respondent. There was no misconduct of the juror as alleged. The following cases show that where the act or thing said or done is a mere indiscretion or inadvertence, and occurred from motives of civility or kindness, without any intent to influence the juror—and where no injustice has been done—the verdict will not be disturbed: *Hilton v. Southworth* (17 Me., 303), *Handley v. Cole* (30 id., 9), *Martin v. Mitchell* (28 Ga., 382), *Shea v. Laurence* (1 Allen, 167), *White v. Wood* (8 Cush., 413), *Jones v. Vuil* (30 N. J. Law Rep., 135), *Erkin v. Morris Canal, etc., Co.* (24 N. J. L., 538), *Sexton v. Leliearve* (4 Coldw., 11), *Morris v. Vivian* (10 Mees. & Wels., 137). It is also distinctly held, in numerous cases, that where the alleged irregularity is brought to the knowledge of the party during the trial, and he proceeds without objection, he thereby consents to abide the result, and he cannot afterwards raise the objection. (*Fessenden v. Sager*, 53 Me., 531; *State v. Daniels*, 44 N. H., 383; *Fox v. Hazelton* 10 Pick., 275; *Hallock v. Franklin*, 2 Met., 560; *Martin v. Tidwell*, 36 Ga., 332.) For so severe an injury, the amount of the verdict cannot be regarded as excessive. (*Sloan v. N. Y. C. and H. R. R. Co.*, 1 Hun, 540; *Hegeman v. Western R. R. Co.*, 16 Barb., 353; *Shaw v. Boston and Wor. R. R. Co.*, 8 Gray, 46; *Ransom v. N. Y. and Erie R. R. Co.*, 15 N. Y., 416; *Laning v. N. Y. C. and H. R. R. Co.*, 49 id., 525; *Saunders v. London, etc., R. Co.*, 98 Eng. Com. Law, 887; *Wright v. London, etc., R. Co.*, L. R., 10 Q. B., 298; L. R., 1 Q. B. Div., 252.) The following cases of a different character, for personal torts, etc., though not strictly in point, are nevertheless illustrative of the large discretion given to juries in the assessment of damages where they are not founded on proof of items or amounts: In *Chambers v. Caulfield* (6 East, 245), a case of *crim. con.*, the verdict was £2,000 or \$10,000, and sustained. In *Wood v. Hurd* (2 Bing. [N. C.], 485; 29 Eng. Com. Law), a case of breach of promise, the verdict was £3,500 or \$17,500, and sustained. In *Merret v. Harvey* (5 Taunton, 442; 1 Eng. Com. Law), an action of trespass on lands, no actual damage, the verdict was £500 or \$2,500, and sustained. HEATH, J., in his opinion, said he knew of a case where a jury gave £500 (\$2,500) damages for merely knocking a man's hat off, and the court refused a new trial. In *Townsend v. Hughes* (2 Modern, 150), an action

of slander, the verdict was £4,000 or \$20,000, and sustained. In *Fabrigas v. Mostyn* (2 W. Black, 929), an action for false imprisonment, the verdict was £3,000 or \$15,000, and sustained. In *Leith v. Pope* (2 W. Black, 1327), an action for malicious prosecution, the verdict was £10,000 or \$50,000, and sustained. In *Scherpf v. Szodeczky* (1 Abb., 366), an action for enticing away a man's wife, the verdict was \$10,000, and sustained. In *Moran v. Dames* (4 Cow., 442), an action for seduction, the verdict was \$9,000, and sustained. (See 24 Barb., 629.) In *Fry v. Bennett* (9 Abb. 45), action for libel, the first verdict was \$10,000 (4 Duer, 247), which was set aside for errors of law, and the second verdict was \$6,000, and sustained. In *Rychman v. Parkins* (9 Wend., 470), an action of slander, the verdict was \$7,000, and was sustained as not excessive. In *Ash v. Aston* (Gen. Term, 2d department), an action of assault and battery, a verdict of \$25,000 was sustained. In *Duberley v. Gunning* (4 Durnf. and East., 651), an action of *crim. con.*, the verdict was £5,000 or \$25,000, and was sustained, although Lord KENYON, before whom the case was tried, would have been satisfied with only nominal damages. In *Hewlett v. Crutchley* (5 Taunton, 277; 1 Eng. Com. Law), an action for malicious prosecution, a verdict for £2,000 or \$10,000 was sustained as not excessive.

LEARNED, P. J. :

The first and principal question is whether the verdict should have been set aside as excessive. On this point the counsel for each side has cited numerous cases. But in making comparisons of other cases with the present, we must notice two things: one is that the relative value of money has diminished in recent times; another is that, generally, in the older parts of the country the relative value of money is less than in the newer. Furthermore it is difficult to make any just comparisons of this kind, unless we have before us all of the facts in each case, and not merely the brief statement of the reported cases.

The plaintiff's right leg was broken near the hip. The leg is an inch and a half shorter than the other. He can go over an even surface with one crutch. He is not able to do much farm work; but has mowed on a mowing-machine, raked with a horse-rake and has driven his team on the road somewhat. The injury is perma-

nent ; and he can never recover from it. He was confined to his bed from the time of the injury in July to the first of October ; was placed in a special bed, and his leg was kept extended by proper appliances for eight weeks. Before the accident he was able to do any thing which he knew how to do about a farm. He had always worked on a farm.

On this point of setting aside verdicts as excessive we may properly follow the rule laid down in *Coleman v. Southwick* (9 Johns., 45), which has been so often quoted. And while the amount recovered in this present case may seem large, we cannot say that it is "beyond all measure unreasonable and outrageous and such as manifestly shows the jury to have been actuated by passion, partiality, prejudice or corruption." A great injury was inflicted on the plaintiff ; a permanent deformity produced, and a partial inability to work during the rest of his life. The plaintiff was in court and seen by the jury. The extent of the injury could be understood better by seeing it than it can be by reading the printed case. The plaintiff was, besides this, confined in bed during the healing of the fracture.

I do not think that there is much to be gained from a critical examination of all the cases of alleged excessive damages. It will generally be found that where verdicts have been set aside on this ground there have been some special or peculiar circumstances. For instance, in *Peck v. New York Central and Hudson River Railroad Company* (11 S. C. N. Y., 236), the General Term evidently disbelieved the plaintiff's statement of his injuries. In *Cox v. New York Central and Hudson River Railroad Company* the verdicts were set aside because there was in fact no harm whatever done to the plaintiff's intestate.

The next point made by the defendant is that the plaintiff should have been nonsuited. The alleged negligence was the wearing away of plank at the crossing. The defendant claims that the weight of the evidence was that the crossing was at least fair and not such as to endanger any prudent traveler. But there was contradictory evidence upon this point ; so that it was proper for the jury.

The defendant further insists that the plaintiff was negligent in driving too fast upon the track, and in using an old wagon with

rotten spokes. But on these points also the evidence was contradictory, both as to the condition of the wagon and as to the rapidity of the plaintiff's driving. And the case seems to have been fairly presented by the learned justice. The jury have decided the matter favorably to the plaintiff.

A motion was made to set aside the verdict for alleged misconduct of a juror. There is no pretense that the juror intended to do any thing wrong. During the trial the court adjourned on Friday; the juror was twelve miles from home; he asked the plaintiff to allow him to ride with him on his way home. The plaintiff consented and the juror rode with plaintiff for about ten miles and then got out of the sleigh. The plaintiff and another person sat on the front seat; the juror sat on the back seat with another person; and two others sat on the middle seat. No conversation whatever in regard to the action was had by any one in the sleigh while the juror was with them. After the trial had been resumed the next week, the fact that the juror had thus ridden with the plaintiff was elicited by the defendant's counsel on a cross-examination of the plaintiff. The plaintiff's counsel, before the case was submitted, offered to allow this juror to be excused, if the defendant's counsel desired it. The defendant's counsel thereupon stated that he was willing to leave it to the juror's sense of propriety, whether he should or should not remain in the jury box. And the court said that the juror had stated the circumstances to the court and that it saw no impropriety in the act of the juror.

From these facts it seems not improbable that the defendant's counsel might have thought that the juror in question, with a desire to show that he had not been improperly influenced, would possibly lean the other way, and would be likely to favor the defendant. If the defendant's counsel had really supposed that the juror had been influenced in favor of the plaintiff, he would probably have accepted the offer to excuse this juror altogether.

The knowledge of this irregularity was brought to the defendant's counsel before the testimony was closed. He made no objection to proceeding with the trial, and did not ask that a juror be withdrawn and the case go over. He must be deemed to have waived the objection. He cannot "take his chance of a favorable verdict, reserving a power to impeach it should it happen to be against



him; a proceeding inconsistent with the plain principles of fair dealing and with the frankness which ought to characterize the whole course of judicial proceedings." (*Fox v. Hazelton*, 10 Pick., 275.) When the counsel said that he left it to the juror's sense of propriety whether or not he should sit, he must be supposed to have meant what he said.

It is not intended to imply that even if the irregularity had not been waived by the defendant it would have been ground sufficient for setting aside the verdict. (*Hilton v. Southwick*, 17 Maine, 303.)

The motion for a new trial on the ground of newly-discovered evidence was properly denied for the reason given in the opinion of the learned justice. The testimony and the character of the witness are also attacked so severely, as to show that little confidence can be placed in the new evidence which the defendant desires to introduce.

A witness for the plaintiff was asked on cross-examination whether he had applied to Milmine for the position of section master and had testified that he had not. Subsequently Milmine was called and asked by defendant whether Tuttle had applied to him for the position of section master and defendant offered to show that Tuttle had applied to Milmine and been refused. This was excluded and defendant excepted. If this question was asked for the purpose of discrediting Tuttle by showing that he had testified falsely it was inadmissible as touching a collateral matter. The defendant, however, claims that it was material as showing a hostile feeling to defendant. But this refusal by Milmine did not necessarily show any hostile feeling by the witness to the defendant. No question had been put tending to show that the feelings of the witness were hostile to the defendant. And this question to Milmine was put so as to indicate that it was intended to show a contradiction of Tuttle. It may be that evidence of the feelings of a witness towards a party is direct evidence in the case. But when a question is put like the present, the answer to which would show the feelings of the witness only inferentially, if at all, it cannot be an error in the court not to understand that possible inference. It by no means followed that Tuttle was hostile to the defendant, because Milmine had refused his application for a position. If the defendant's counsel thought that hostility might be inferred, he

should, in fairness, have explained this remote bearing of the evidence upon the merits.

Several exceptions to evidence are briefly made by the defendant. The statement by Adams was not objected to until given. No motion to strike it out appears. The conversation with Frayer, the "section boss," was allowed only to show actual notice to the defendant of the condition of the crossing. It was his duty to attend to the repairing. And it was proper to show notice to the defendant's officers that the crossing was out of repair.

Yeomans, a blacksmith, testified to his familiarity with wood, and gave his opinion as to the toughness of one of the wheels of the wagon, judging from its manner of breaking. This was before the accident. There seems to be nothing wrong in the admission of this evidence. The testimony of Stanton as to the manner of his own crossing the track was only a statement of the condition of the crossing which made it necessary to turn out so as to avoid the worn places.

The testimony by Reynolds as to the repairing of the crossing was expressly allowed only to show that the examination made of the crossing and testified to by him, had been made after the crossing had in fact been repaired. It was therefore proper. The same appears to be true of Stanton's testimony on this point.

Before Tuttle gave evidence of his recent measurements of the ascent he testified to the amount of change which had been made on the railroad. This testimony made the recent measurements competent evidence.

From this examination we think that the order denying a new trial should be affirmed and judgment ordered on the verdict with costs.

Present — LEARNED, P. J., BOARDMAN and SAWYER, JJ.

Order denying new trial affirmed, with costs.

MARY W. SMITH, PLAINTIFF, v. EVALYN KENNEDY,  
DEFENDANT.

*Married woman—liability of, on note, when her husband has entire control of her business.*

This action was brought to recover the amount of a promissory note made by the defendant, a married woman, who owned a farm of 380 acres, on which she lived with her husband. He had no property, but carried on the farm for her and bought and sold whatever he pleased, using her money by her consent. Every thing he bought became hers. The proceeds of the note, as soon as received, were given by her to her husband, and were not used by him for plaintiff's benefit or that of her separate estate.

*Held*, that the defendant was engaged in carrying on the business of farming through her husband, acting as her agent, and that she was liable for the amount of the note.

MOTION for a new trial on a case and exception ordered to be heard in the first instance at the General Term, after a verdict directed in favor of the plaintiff.

This action was brought upon a promissory note made by defendant, payable to Mary W. Smith or bearer, for \$500, with use, and dated on the 4th day of July, 1865, payable one day after date. The defense, among other things, was that the defendant at the time of the execution and delivery of the note was a married woman, and that the note was executed and delivered for money loaned to her husband, George W. Kennedy, and was not given for the benefit of her separate estate. The defendant received the money and gave her note for it. She immediately gave the money to her husband, who testified that none of it was used for defendant's benefit or for the benefit of her separate estate. At the close of the evidence the defendant made a motion for a nonsuit, which motion was denied, and defendant duly excepted. The defendant then requested the court to direct a verdict for the defendant, which was refused, and defendant excepted.

The plaintiff's counsel requested the court to direct a verdict for the plaintiff and against the defendant for the amount of the note and interest and costs, on the ground that the money being delivered to defendant, and she executing the note, was evidence that the

money was obtained for the benefit of her separate estate, and thereupon the court directed a verdict in favor of the plaintiff and against the defendant for \$652.80, to which decision and direction thus made defendant duly excepted.

*Waters & Know*, for the plaintiff.

*H. C. Miner*, for the defendant.

LEARNED, P. J. :

On the trial of this case the counsel of each party thought there was no question for the jury and the court directed a verdict for the plaintiff.

The defendant was a married woman and owned a farm. Her husband did not own a dollar ; but he carried on the farm and dealt with it by her permission, as he chose. When he bought any property he bought it for her. If he wanted to sell any thing he sold it ; and he used this defendant's money, by her consent, as he pleased. The farm was one of 330 acres, and there were, at the time of the transaction, sixty cows on it. Whatever the husband bought on the farm was the wife's property ; and his creditors could not find any property of his.

This, then, is a case where a married woman was carrying on the business of farming through her husband as her agent. He was none the less her agent because she seems to have given him unlimited power and authority to do as he pleased. The avails of the business were hers, although she choose to give them to him. In *Nash v. Mitchell* (MSS., decided November 13, 1877) the Court of Appeals held that the management by a married woman of her landed property, the receipt of the rents and income and the disposing of them was not a trade or business within the meaning of the statute. But in the present case the defendant actually carried on the business of farming and was not merely in receipt of rents.

She borrowed this money in her own name and received it herself. She then handed it over to her husband who was carrying on the farm. It thus became part of the property employed in that business. The fact that the husband wasted or misused it does not alter the liability of the wife who borrowed it.

The very money borrowed became a part of her separate estate

by the act of borrowing, and the promise to repay it related to her separate estate. Her husband was not liable; and it would be utterly unrighteous if she should be permitted to cheat the plaintiff out of this money. (*Bodine v. Killeen*, 53 N. Y., 93.)

The motion for new trial should be denied and judgment ordered on the verdict, with costs.

BOARDMAN, J. :

The case of *Bodine v. Killeen* (53 N. Y., 93) seems to me to sustain the foregoing views and conclusion.

Present — LEARNED, P. J., BOARDMAN and SAWYER, JJ.

New trial denied and judgment ordered for plaintiff on verdict, with costs.

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OLIVER P. RANNEY, APPELLANT, v. SQUIRE A. WARREN,  
RESPONDENT.

*Fraudulent representations — an action lies to annul bond and mortgage procured by.*

The complaint in this action alleged that the plaintiff was induced, by the fraudulent representations of the defendant, to purchase from him a farm for \$18,000, which, if his representations had been true, would have been worth \$20,000, but it was, in fact, worth not over \$12,000; that he paid \$5,000 in cash, assumed a mortgage for \$2,000, and gave a bond and mortgage back for \$11,000, payable in \$1,000 annual installments, one of which he had paid, and prayed that the bond and mortgage might be canceled, and for damages. At the Circuit the complaint was dismissed, on the ground that no damages had as yet been sustained, and that the facts alleged would prove a defense to an action brought to foreclose the \$11,000 mortgage.

*Held*, that the court erred in dismissing the complaint; that, upon the facts alleged therein, the plaintiff was entitled to maintain an action in equity to have the bond and mortgage canceled and delivered up to him.

APPEAL from a judgment in favor of the defendant, entered upon a nonsuit directed at the Circuit.

The plaintiff's complaint alleges that by the defendant's fraudulent representations he was induced to purchase a farm of the defendant for the sum of \$18,000; that the farm was, in fact, worth not over \$12,000; that if the defendant's representations had been true the

farm would have been worth \$20,000; that the plaintiff paid in cash \$5,000, assumed a mortgage of \$2,000, and gave a bond and mortgage for \$11,000, payable in \$1,000 annual installments, one of which he has since paid.

He asks that the bond and mortgage be declared void and canceled, and given up to him, and for damages and costs.

The justice who tried the case held that damages had not been sustained, and that it was not certain that they would be sustained, since the defendant left unpaid the purchase-price of the farm, to an amount greater than the damages claimed, and if the allegations of the complaint were true, that he could defeat a recovery on the bond.

*R. C. Betts*, for the appellant.

*Tanner & Potter*, for the respondent.

LEARNED, P. J.:

Without discussing the correctness of the learned justice on the mere question of damages it seems to us that he overlooked the fact that a part of the relief demanded, and perhaps the principal part, was the equitable relief of a surrender and cancellation of the bond. If the allegations of the complaint were true the defendant had by fraud procured the plaintiff to execute this bond and the accompanying mortgage.

Now fraud is often a defense at law to an action upon an instrument. But on the other hand fraud is a ground for affirmative relief in equity; that is, for the relief of decreeing a surrender and cancellation of the instrument, the execution of which was obtained by fraud. And there are some cases where the relief in equity is much more safe and complete. In the present case, for instance, this bond is payable in installments. It will be ten years from the time of the transaction before the last installment becomes payable. The proof of the alleged fraud may by that time be difficult. Questions may arise as to the statute of limitations. For these and for other reasons the present seems to be a case (assuming the complaint to be true) where it would be proper for equity to grant affirmative relief against this bond and mortgage.

It is not necessary to refer to authorities to show that where a person has by fraud procured another to execute a bond equity may sustain an action to compel the surrender of the instrument, although no actual money damage has yet been sustained. It cannot affect this general principle that the fraud was committed in the sale of land to the obligor, provided the fraud was in fact practiced; and provided the circumstances show that the equitable relief is needed to do justice between the parties.

The judgment should be reversed and a new trial granted, costs to abide the event.

BOARDMAN, J. :

I concur in the result, but think the error consisted in holding that a cause of action for fraud was not stated in complaint, and that no damages could be recovered because the damages alleged were less than the unpaid purchase-price of the farm.

Present — LEARNED, P. J., BOARDMAN and SAWYER, JJ.

Judgment reversed and new trial granted, costs to abide event.

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JAMES W. RICHARDSON, APPELLANT, v. SAMUEL S. WARNER AND OTHERS, ADMINISTRATORS ETC., OF MICHAEL WARNER, DECEASED, RESPONDENTS.

*Sec. 399 of Code — "assignee" — meaning of — what witnesses excluded by — § 829 of the Code of Civil Procedure.*

This action was brought upon a promissory note made by the defendant Warner, to the order of and indorsed by one Ayer, and subsequently indorsed by one Alexander, and by him transferred to the plaintiff. Alexander died before the trial. The signatures of the maker and indorsers were proved. Ayer was called by the defendants, the legal representatives of Warner, and against plaintiff's objection and exception allowed to testify as to a personal transaction, between himself and Alexander, tending to establish the defense of usury.

*Held*, that Richardson was an "assignee" of Alexander, within the meaning of section 399 of the Code:

That Ayer was a person "from, through or under whom" Richardson derived title within the meaning of that section.

That the fact that the defendants, the legal representatives of Warner, by whom Ayer was called, did not derive title from him, did not render him competent. That the evidence should have been excluded.

Under section 829 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, the witness would have been competent, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest.

APPEAL from a judgment in favor of the defendants entered upon the report of a referee. The action was brought to recover on three promissory notes, one for \$3,000 and two for \$2,500 each, made by Michael Warner, the original defendant and the intestate of the present defendants, and indorsed by one Daniel Ayer.

The answer admitted the execution of the notes, but alleged that they were made solely for Ayer's accommodation, and that Ayer indorsed them and procured them to be discounted at a usurious and unlawful rate of interest. The plaintiff gave in evidence the notes indorsed by Daniel Ayer and Andrew Alexander, and it was admitted that Alexander was dead at the time of the trial. Defendants then called Daniel Ayer as a witness, and offered to prove by him an oral usurious agreement for the discount of the notes, made between himself and Andrew Alexander, deceased. His testimony was objected to by plaintiff's counsel as incompetent and inadmissible under section 399 of the Code. The defendants' counsel then delivered to the witness a release of all claims, executed by the defendants. This was objected to by the plaintiff as immaterial, and that it did not make the witness competent, or affect his right to testify; and that a release by administrators for a nominal consideration was unauthorized and invalid; but it was received in evidence, and the witness was then allowed, under the objection and exception of plaintiff, to give evidence of a personal transaction between himself and Andrew Alexander, deceased. He testified that the notes were made by Michael Warner for his, witness, accommodation; that he got them discounted by Alexander at a rate of not less than ten per cent, and Alexander gave him the avails of the three notes, deducting the discount.

The plaintiff moved to strike out Ayer's testimony as to the discount of the notes and rate of discount on the same ground as stated in the objections. The motion was denied, and the plaintiff excepted.



The principal question in the case is, whether Ayer was a competent witness in this case as against the plaintiff.

*Matthew Hale*, for the appellant.

*Parker & Countryman*, for the respondents. Ayer was not examined against the executor, administrator, heir at law, next of kin, assignee, legatee, devisee or survivor of Alexander. The plaintiff was not the assignee of Alexander. (*Bartlett v. Tarbox*, 1 Keyes, 495; *Porter v. Potter*, 18 N. Y., 52; *Gardner v. Gordon*, 3 Bosw., 369; *Anderson v. Busted*, 5 Duer, 485; *Traphagan v. Traphagan*, 40 Barb., 537; *McCray v. McCray*, 12 Abb., 1; *Spalding v. Hallenbeck*, 39 Barb., 79.) "Assignee" does not include "legatee." (*Hight v. Sackett*, 34 N. Y., 447.) Ayer did not come within either of the three classes mentioned in the first part of section 399. He was not the party; he was not interested, for he had been released. He was not a person from whom the party calling him derived title. A co-party defendant is excluded by section 399. (*Alexander v. Dutchess*, 7 Hun, 439; *Genet v. Sawyer*, 61 Barb., 211.) But the restriction has never been held to apply to an adverse party.

LEARNED, P. J. :

The witness offered is Ayer. The personal transaction is, between him and Alexander, deceased. And Ayer is examined against Richardson.

The first question then is, whether Richardson is the assignee of Alexander, deceased, under the meaning of this section. The defendants, to show that he is not, cite *Bartlett v. Tarbox* (1 Keyes, 495), and *Porter v. Potter* (18 N. Y., 52). But these decisions do not apply. The section of the Code, as it then stood, was quite different. In the latter of these cases Judge DENIO remarked that the decision would not be a precedent, because the Code had been changed (see Code of 1851); *Mattoon v. Young* (45 N. Y., 696), held that the word assignee in this section included a grantee, and the court said that the intention was to exclude the testimony as to all persons who have succeeded to or acquired the right of the deceased. (See, also, *Cary v. White*, 59 N. Y., 336; *Andrews*

v. *National Bank of North America*, 14 S. C., N. Y., 20.) And if we look at the reason of the rule it is plain that the section should apply to Richardson as to an assignee of Alexander. Ayer is about to testify to a personal transaction between him and Alexander, and Alexander is not living to contradict him. Richardson took the note from Alexander.. He is the assignee of Alexander, as was held by the referee.

The next question is, whether Ayer belongs to any one of the three classes of persons who are excluded. He is not a party. Is he a person from through or under whom a party to the action derives any interest or title? The latter part of the section which we have been examining above enumerates the persons against whom certain witnesses may not testify. The first part, which we are now considering, defines who these witnesses are. They are, first, parties; second, persons interested; third, persons from, through or under whom parties or persons interested derive title or interest.

The note was made by Warner to the order of, and was indorsed by, Ayer. The signatures were proved to be genuine and the death of Alexander was proved. At this point Ayer was offered as a witness. Now the plaintiff derived his title to the note through and under Ayer. It was necessary to prove Ayer's transfer of the note by indorsement in order to show the plaintiff's title. And the plaintiff's title had in fact been shown in that way.

True, the plaintiff's title did not come directly from Ayer, but passed through Alexander. But the language of the section is broad — "from, through or under," "derives any interest" "by assignment or otherwise." The plaintiff has a title to the note and thus a right of action against Warner. How does he derive it? From Ayer's transfer to Alexander and Alexander to him.

It is argued by the defendants (and it was so held by the learned referee) that as the defendants called Ayer as a witness and as they did not derive their title from him, he was competent. There is force in this view. But it seems to us that we must follow the language of the section. In *Mattoon v. Young* (*ut supra*) it was held by the Court of Appeals that this section in some instances rendered witnesses incompetent who had been competent by the common law. In *Alexander v. Dutcher* (14 S. C. N. Y., 439), affirmed in the

Court of Appeals) it was held that this section made a witness incompetent in a case where previously he had been competent by statute. So that the section had been held to have a restrictive and not always an enlarging, effect. And the language of the section is general. It does not say: "Any person from, through or under whom the party calling him derives any interest. (*Le Clare v. Stewart*, 15 S. C. N. Y., 127.) Since the trial of this action the legislature have changed the section so as to conform to the position of the defendants, by inserting, after the word "witness," the words "in his own behalf or interest." (Code of Civil Procedure, § 839.) This change of language indicates that the section, as it stood at the time of the trial, was not to be construed as if it contained those words. So far as this construction of the section should seem to apply to a party when called as a witness it is probably controlled by the previous section, 390. The evil which section 399 guards against can hardly exist when the party is called against himself by the other.

For these reasons we think Ayer was improperly admitted and there must be a new trial, costs to abide the event; reference discharged.

Present — LEARNED, P. J., BOARDMAN and SAWYER, JJ.

Judgment reversed and new trial granted; reference discharged, costs to abide event.

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# THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENTS, v. DANIEL STEPHENS AND OTHERS, APPELLANTS.

*What lands taken for canals may be abandoned — Const. of 1846, art. 7, § 6 — power of legislature to dispose of canals — Letters patent — presumption as to issue of.*

Section 8 of chapter 352 of 1849, authorizing the commissioners of the land office to convey "lands taken for canal purposes," which the canal board shall have determined may be sold beneficially to the State, and chapter 267 of 1857, authorizing them to convey any "lands taken for the purposes of the canals of this State" when the canal board shall have determined that they have been

abandoned, authorize a conveyance of lands taken for the bed of the canal itself, when that portion of the canal has fallen into decay, and ceased practically to be used as a canal.

Section 6 of article 7 of the Constitution of 1848, providing that "the legislature shall not sell, lease or otherwise dispose of any of the canals of this State, but they shall remain the property of the State and under its management forever," only applies to the canals while they continue to be canals, and not to cases in which, as the result of natural causes, not fraudulently produced, the canals cease to be used as canals and are of no further use to the people of the State. In determining the extent of the authority conferred upon a board of State officers, resort may be had to the subsequent legislative construction of the statutes conferring the same.

Letters patent are presumed to have been regularly issued.

**APPEAL** from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was brought to vacate letters patent issued by the governor of this State to the defendant Daniel Stephens and others, of the southern terminus of the Chemung canal.

The justice before whom the action was tried found, among other things, that the canal commissioners of this State, in pursuance of an act of the legislature thereof, passed April 15, 1829, authorizing and requiring them to construct and complete a navigable canal from the head waters of Seneca lake to the Chemung river at Elmira, took and appropriated for that purpose lands hereinafter described in letters patent issued to the defendants, Daniel Stephens, Frederick C. Steele and one Elijah P. Brooks, and constructed and completed said canal in 1832, and in the construction and completion thereof, for the purpose of permitting the passage of boats, rafts and other water craft from said river to and upon the canal, and from said canal to and upon the river, constructed near the intersection of said canal with said river a canal lock, known as lock forty-nine, the north end of which was about 250 feet from the intersection of said canal with the river; that said canal was, including said lock and the intersection of said canal with said river, one of the canals of this State when the Constitution of 1846 took effect; that said lake and said river were each navigable waters, and that one object of authorizing and requiring the constructing of said canal was to connect the navigable waters of Seneca lake with those of Chemung river, and not only to increase for public benefit the use of said lake and river, but to gain

for the canal profits to be derived from the commerce of both lake and river. Afterwards the Junction Canal Company, a private corporation, constructed a navigable canal, known as the Junction canal, in which the State had no interest and over which it had no control, commencing at and intersecting the Chemung canal about one mile north of its terminus at the Chemung river, and extending therefrom in a south-easterly direction about one and a half miles to, and then intersecting the Chemung river about two miles below or down the river from the southern terminus or intersection of the Chemung canal with the river; that said junction canal was completed and opened for business in 1856; that the southern terminus of the Chemung canal, including lock forty-nine, continued to be used as it had theretofore been used, for the purpose of navigating boats, rafts and other craft from said river to and upon said Chemung canal, and from said canal to and upon said river, until 1858, after which it was permitted to become out of repair, insomuch that a portion of it, including said lock forty-nine, became unfit for use until it should be placed in repair; that while the southern terminus of said canal, including said lock forty-nine, was in this condition unfit for use, and prior to the 11th day of June, 1866, one Charles Hulett and others applied to the canal board to have certain lands declared abandoned; that, on the 17th day of July, 1866, the commissioners of the land office resolved that certain lands in the city of Elmira, declared abandoned by a resolution of the canal board passed that day, be granted to Daniel Stephens, Frederick C. Steele, Elijah P. Brooks, Charles Hulett and William Beach, grantees of the original owners, etc.; that, on the said seventeenth day of July, the governor of this State by letters patent granted and quitclaimed to the defendants, Daniel Stephens, Frederick C. Steele and to Elijah P. Brooks a parcel of the said premises; that said premises described in said letters patent included said lock forty-nine, then an existing and material portion of the Chemung canal, though at the time out of repair and unfit for use, and which was the only passage owned by the State through which boats, rafts or other water craft could be passed from said canal to and upon the river, or from said river to and upon the canal, or for the water let into said canal for the purposes of navigation to pass therefrom at or within several miles of its southern terminus, and for that purpose alone it was

material and necessary not only for the preservation of the canal north of it, but to prevent an overflow of the banks of the canal, thereby injuring the property of private owners, unless other means were devised for the discharge of the waters; that the governor issued his letters patent in ignorance of the fact that the premises described therein embraced lock forty-nine; that the same or any portion thereof had not been abandoned by reason of any other means provided by the State for the passage of boats or other craft to and from said river, and that said lock was then an existing portion of the Chemung canal, though out of repair and unfit for use; that each and all of the defendants rely upon and claim title under said letters patent, and found as a conclusion of law from the foregoing facts, that the plaintiffs were entitled to the judgment of this court that said letters patent be annulled or removed as a cloud upon the plaintiff's title to said premises, with costs to be adjusted.

*C. S. Fairchild*, attorney-general, for the plaintiff.

*Robert Stephens*, for the defendants Stephens and Steele.

*Turner, Dexter & Van Duzer*, for the defendant S. B. Hubbell.

*Rufus King*, for the defendants L. A. and J. S. Humphrey.

SAWYER, J. :

It is to be presumed in the first place that these letters patent were regularly issued. (*People v. Mauran*, 5 Den., 398; *Jackson v. Marsh*, 6 Cow., 282.) Their validity depends, therefore, in the first place, upon the construction to be given to the various acts of the legislature conferring authority upon the canal board to sell and dispose of lands taken for the use of the canals. Section 3 of chapter 352, Laws of 1849, authorizes the conveyance, by the proper officers, of lands taken for canal purposes, and which the canal board shall, by resolution, determine, may be sold beneficially to the State. And in 1857, by chapter 267, the legislature enacted, section 1 : "Whenever the canal board shall, by resolution, determine that any lands taken for the purposes of the canals of this State have been abandoned \* \* \* it shall, or may, be lawful for the commis-

sioners of the land office to sell, grant and convey the right, title and interest of the State in such lands." Section 2: "The original owner or owners of said abandoned canals, their heirs or assigns who may be the owners of lands adjoining thereto, shall have the preference, etc., in purchasing." The power to grant the lands in question depends upon the authority conferred by these statutes upon the canal board.

And it is contended that because some part of these lands once constituted a portion of the canal itself, therefore the canal board had no right under these statutes ever to declare it abandoned, and per consequence, the commissioners of the land office ever to grant or convey the same.

It seems an over refinement in the construction of language to say that the expressions "lands taken for canal purposes," and "lands taken for the purpose of canals," necessarily import lands that have not been used for the bed of the canal, and that the authority to declare, by resolution, "that lands taken for the purposes of the canal have been abandoned," may not include a portion of the canal that has ceased to be used, fallen into decay, been filled up and ceased practically any longer to be a canal. If we may resort to legislative construction to determine whether authority was intended by these statutes to be given to abandon what had once been a portion of the canal, it will appear that the portion of the canal upon the lands covered by the defendants' patent has been most unequivocally treated as abandoned.

By chapter 471, Laws of 1864, the legislature authorized the canal commissioners to build, in place of lock 49, an arched stone culvert to act as a waste-weir.

By chapter 785, Laws of 1872, the legislature authorized a portion of the bed of this canal to be used for a public street, and by chapter 607, Laws of 1875, authorized the city of Elmira to fill in and use a certain other portion of the canal bed for a street.

Resort may also be had to the title of a statute, to aid in determining its meaning, when its meaning is doubtful. (*Jackson v. Gilchrist*, 15 Johns., 89; *Constantine v. Van Winkle*, 6 Hill, 184; *U. S. v. Fisher*, 2 Cranch, 358; *Potter's Dwaris on Statutes*, 269.) And recurring to the title of this statute (chap. 267, Laws 1857), we find it thus: "An act in relation to abandoned canals." It would seem, therefore, that the terms "lands taken for the purpose of the

canals," and "lands taken for canal purposes," might include the former bed of an abandoned or disused canal, or a portion of it. (See, also, chap. 361, Laws of 1869.)

I do not think section 2 of chapter 169, Laws of 1862, was intended to limit the previous acts or construe them. That act specially mentions the canals intended to be affected by it.

The act is, "An act in relation to the enlargement and completion of the canals," and refers to the canals mentioned in section 3 of article 7 of the Constitution, among which is not the Chemung canal. That had long prior to the Constitution been completed, and its enlargement not provided for or contemplated.

These considerations lead to the conclusion that the letters patent issued in this case and the resolution of the canal board were authorized by the statute and fully warranted by the facts, no fraud being claimed or proven, unless they are in violation of section 6, article 7 of the Constitution of 1846. In *The People v. Dayton* (55 N. Y., 367), the court say: "The practical construction given by the legislature to a constitutional provision acquiesced in for years, acted upon by the executive and administrative officers, unquestioned for years, is entitled to controlling weight in its interpretation."

The legislature, since the adoption of the Constitution of 1846, have passed various acts for abandoning and selling portions of the canal, which have received the approval of the executive and have never been questioned; among which are chapter 214, Laws of 1850; chapter 361, Laws of 1869.

The evidence clearly establishes, and the findings of the learned judge before whom this case was tried confirm, the fact that, for all practicable purposes, this portion of the canal between the basin and the Chemung river, covered by this grant, had become utterly useless to the State and had been practically abandoned as far back as 1858. The clear and obvious meaning of this section of the Constitution is, that the State will not lease and sell the canals while they continue to be canals; but will it be contended that if, by any convulsion of nature, the bed of the canal, or any portion of it, should be reversed, so that instead of a ditch there was a ridge, that the State would be bound to keep the lands, worthless for navigation, worthless to the State, worthless and unusable for all the purposes for which they were obtained. If so, the action of the canal



board in selling the old bed of the Erie canal, where curvatures had been cut off to straighten it, and the old channel abandoned, was clearly unconstitutional; and yet I fail to find that the strictest constructionist has ever so held.

But it will be said that by this theory the whole of the canals might eventually be absorbed; granted; and what then? If the gradual abandonment be the result of natural causes, be not fraudulently produced, by which the canals cease to be canals and of no further use to the people of the State, clearly the Constitution did not contemplate that the people should remain the owners of these waste lands forever; they are not to be leased or sold so long as they continue to be canals. When they cease to be canals, the reason for the inhibition ceases, and with it the inhibition. *Cessante ratione legis cessat ipsa lex.* These views render it unnecessary to consider the other questions raised by this appeal.

The judgment should be reversed and judgment directed for the defendants, dismissing plaintiff's complaint with costs.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment reversed and judgment ordered for defendants, dismissing complaint with costs.

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69	508
13	23
70	492

FLOYD PELTON, PLAINTIFF, v. THE WESTCHESTER FIRE INSURANCE COMPANY, DEFENDANT.

*Insurance on interest of purchaser of land — in possession and in default under a contract for the sale thereof.*

A policy of insurance issued to one in possession of land under a contract for the purchase thereof, is not rendered invalid by the fact that, at the time of issuing the policy, the assured has, by a failure to perform the contract on his part, rendered the same voidable at the election of the vendor, where such right has not been exercised, although the fact that he was in default was not stated to the company.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict for plaintiff directed by the court.

The plaintiff was the owner of a lot in the village of Monticello. On the 3d day of May, 1872, he entered into a contract with one Samuel K. Brown for the sale of said lot to said Brown, which contained, together with the usual provisions of executory contracts for the sale and purchase of land, a covenant on the part of Brown that he would erect on the premises a building worth, at least, \$1,000; and that he would keep the premises insured and the policy assigned to Pelton, the plaintiff. Under such contract, Brown took possession of the property and erected the building.

On or about September 1, 1872, Brown and defendant's agent made a contract for the insurance of such building, upon which a policy in due form, bearing such date, was issued. The agent testifies that, in that conversation, Brown told him that he (Brown) was the owner of the building; that there was no mortgage on it; that he owed something on it for labor and materials.

On the 8th of October, 1872, the following indorsement was made on this policy: "Oct. 8, 1872. Loss, if any, payable to Floyd Pelton, mortgagee, as his interest may appear." The word "mortgagee" was subsequently erased by defendant's agent, and the words "as collateral" were inserted in their place. This was done at the request of plaintiff's attorney. When the year expired, a new policy was issued in renewal of the old one, containing the same clause relative to payment to plaintiff. The word "mortgagee" was retained, however, by mistake, the change having been made at Monticello, and not having been noted on the books of the agency, which were at Ellenville. While this latter policy was in force, the building was totally destroyed by fire. At the time of the fire the plaintiff was still the owner in fee of the premises, and Brown was in possession under his contract. Due proof of loss having been made, and the defendant having refused to pay, this action was brought on the policy. The defendant claimed that, at the time of procuring the insurance, Brown had not the entire, unconditional and sole ownership of the premises, but that he was in possession thereof under a contract to purchase the same; and that the sum he had agreed to pay had not been paid pursuant to the terms thereof, by reason whereof the contract had become forfeited. It came on for trial at the Sullivan Circuit, where a verdict was ordered for the

plaintiff for \$1,189, and the presiding justice directed the exceptions to be heard at the General Term in the first instance.

*A. Schoonmaker*, for the plaintiff.

*A. C. & T. A. Niven*, for the defendant.

SAWYER, J. :

All of the questions raised by the appeal in this action have been adjudicated adversely to the appellants (*Frink v. Hampden Ins. Co.*, 1 Abbott [N. S.], 343; *Grosvenor v. Atlantic Ins. Co.*, 17 N. Y., 391; *Acer v. Merchants' Ins. Co.*, 57 Barb., 68; *Ætna Ins. Co. v. Tyler*, 16 Wend., 385; *Dohn v. Farmers' Ins. Co.*, 5 Lans., 279; *Maher v. Hibernian Ins. Co.*, 6 Hun, 353; *Rowley v. Empire Ins. Co.*, 36 N. Y., 550; *Owens v. H. P. Ins. Co.*, 56 id., 565; *Pitney v. Glens Falls Ins. Co.*, 65 id., 6), except the question, what effect was produced in the relations between the insured and the insurer by the fact that at the time of effecting the insurance Brown, the insured, was in default in making the payments called for by his contract of purchase, such fact not having been brought to the direct knowledge of the defendant.

Brown's contract of purchase contained, among other things, this provision: "On failure to perform the contract on the part of Brown, the said Pelton may declare the contract void and retain whatever moneys have been paid thereon." Brown was confessedly in arrear in making his payments, but he was in possession of the premises and had erected thereon the building called for by the contract which was the subject of this insurance. Pelton, the vendor, had not availed himself of his legal right to declare the contract void. How, then, did this affect the relative rights of the parties? This provision did not, upon default in payment, render the contract void, but voidable only, at the election of the vendor; he having not so elected, no change in the relative positions affecting the title was produced. Either party might still insist upon a specific performance. (*Lawrence v. Dale*, 3 Johns. Chancery, 23; *Hutchins v. Munger*, 41 N. Y., 155.) The contract, therefore, as between the parties to it, was still a valid and subsisting contract, enforceable by either party upon tendering performance. (*Kort-*

*right v. Cady*, 41 N. Y., 343.) Brown's equitable title to the premises and insurable interest in the buildings erected thereon had not ceased by reason of the default, and within the doctrine of the cases cited (*supra*) he did not misstate his interest nor violate the conditions of the policy in not disclosing that fact.

The exceptions, therefore, must be overruled and judgment ordered upon the verdict for the plaintiff, with costs

LEARNED, P. J., and BOARDMAN, J., concurred.

Motion for new trial denied, and judgment ordered for plaintiff on verdict, with costs.

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ELIZABETH M. ALVORD, PLAINTIFF, v. NICHOLAS H.  
HAYNES AND CHARLES TOWER, DEFENDANTS.

*Levy by sheriff — when sufficient to sustain replevin or action for conversion — plaintiff in judgment — when responsible for acts of sheriff.*

A sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife.

*Held*, that the act of the sheriff in levying upon the property was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property.

That his liability was not affected by the fact that he claimed to levy upon, and advertised for sale the interest of the husband alone, when the husband had, in fact, no interest therein.

The facts that the plaintiff, in the judgment, directed the sheriff to get the executions, and consulted and advised with him and approved of his making the levy, are sufficient to sustain a verdict against him.

MOTION for a new trial on a case, and exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff, directed by the court.

This was an action for the claim and delivery of personal property consisting of farming tools, farming stock and unharvested crops, brought by the plaintiff, who is a married woman, against the defendant Haynes, who is sheriff of Cortland county, and who, by virtue of two executions issued out of the County Court at the instance

of the defendant Tower, who was plaintiff in said executions, levied upon the aforesaid property. There was no removal of the property levied upon, and the sheriff claimed to levy upon and advertise for sale only the interest of Fenn G. Alvord, the plaintiff's husband, in said property. The evidence showed that the plaintiff leased the farm upon which said property was, of her father-in-law, and had carried it on for several years, paying the rent herself, and disposing of the products of the farm and receiving the avails thereof, and that the property levied upon was the growth of said farm, or arose out of the products thereof. It appeared that the plaintiff had some property or money in her own right, and that she managed said farm and disposed of the products thereof through her husband, as her agent. It also appeared that the defendant Tower directed the sheriff to procure said executions and advised and consulted with the sheriff in regard to levying upon the property.

This action came on to be tried at the Cortland Circuit in September, 1876, before Mr. Justice FOLLETT and a jury. At the close of the testimony the court held that there was no question of fact for the jury, and directed the jury to find a verdict for the plaintiff for the return of the property, assessing its value as proved on the trial, and as to which there was no dispute, and six cents damages for the detention thereof, to which direction the defendant excepted. The jury found a verdict for the plaintiff in accordance with the foregoing directions, to which the defendant excepted. The court directed the exceptions to be heard in the first instance at the General Term, and that judgment be in the meantime suspended.

*Waters & Knox*, for the plaintiff.

*O. Porter*, for the defendant. This property was all made by the labor of Fenn G. Alvord and his minor son. (*Buckley v. Wills*, 42 Barb., 569; *Goss v. Cahill*, 42 id., 310; *Vrooman v. Griffiths*, 4 Ct. App. Dec., 505; *Merchant v. Bunnell*, 3 id., 280.) If the capital is furnished by the wife, and her husband has no interest but that of a mere agent or servant, she is entitled to the profits. If there is no capital *but* the husband's labor and the labor of his minor son, she cannot have the profits.

The property is the fruit of the labor of the husband and his minor son. (*Rider v. Hulse*, 24 N. Y., 372; 33 Barb., 264; 42 id., 310; id., 569.) The plaintiff was in the actual possession of the property at the time this action was commenced. To maintain replevin, the property must be taken out of the actual possession of the owner. (3 Wend., 280; 4 Comst., 183; 20 Johns., 465; 14 Wend., 201, 202.)

SAWYER, J. :

There were no disputed questions of fact in this case to be submitted to the jury.

The plaintiff's title to the property in question was clearly established by the evidence. She leased the farm and paid the rent, and the property taken in execution was either purchased with her money or raised on the farm. True, her husband labored on the farm, and acted as her agent in disposing of its products, but this did not vest the title thereto in him, or give him any interest therein. The right of a married woman to purchase or lease real or personal property and to manage the same through an agent, though that agent be her husband, and to hold to her own use the avails thereof, in cases free from fraud, was fully settled in *Knapp v. Smith* (27 N. Y., 277). In the case at bar there was no proof of fraudulent intent.

The act of the sheriff in levying upon the property of Fenn G. Alvord for sale was such an exercise of dominion over it as would sustain an action for its conversion, or replevin, although there was no actual removal. (*Stewart v. Wells*, 6 Barb., 79, approved by the Court of Appeals in *Knapp v. Smith*, *supra*.)

Trover and replevin in such cases are concurrent remedies. (*Allen v. Crary*, 10 Wend., 349; *Fonda v. Van Horne*, 15 id., 631.)

It does not change the rule nor aid the defendants that the sheriff claimed to levy upon and advertised for sale the interest only of Fenn G. Alvord in the property, it appearing that he had no interest therein. (*Neff v. Thompson*, 8 Barb., 213.) There was sufficient evidence that the defendant Tower, authorized the proceedings to sustain the verdict as against him; he directed the sheriff to get the executions, consulted and advised with him and approved of his levying upon the property. Slight interferences in such cases will

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sustain a verdict. (*Knapp v. Smith, supra*; *Farrar v. Chauffetete* 5 Denio, 527.)

The exceptions must be overruled, and judgment ordered for the plaintiff upon the verdict.

LEARNED, P. J. and BOARDMAN, J., concurred.

New trial denied, and judgment ordered for plaintiff on verdict, with costs.

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HORATIO SEYMOUR AND OTHERS, EXECUTORS, ETC., APPELLANTS, v. ELIZABETH F. CAGGER, ADMINISTRATRIX, ETC., RESPONDENT.

*Services rendered by an attorney—effect on recovery for, of death of attorney during pendency of action—Negligence of attorney—burden of proof as to.*

The defendant's intestate and the plaintiffs' testator entered into an agreement whereby the former, an attorney, agreed to collect the rents due on certain manorial leases belonging to the latter, and to receive for such services the taxable costs of the actions to be brought; under which agreement some twenty or thirty actions were commenced. At the time of the death of defendant's intestate, plaintiffs had been defeated in one action because of a failure to notify the tenant of an assignment of the lease, two actions had been discontinued and the costs paid, and seven were pending; to the two actions discontinued and the seven actions still pending, the same defense of neglect to give notice of the assignment of the lease had been interposed. Upon an accounting, the referee found that the amount of the taxable costs in said nine actions was \$901.81, but refused to allow that amount to the defendant. The court at Special Term held that as the notice was not properly a proceeding in the action, that the mere fact that the defendant's intestate commenced the actions for the assignee of the lease, without ascertaining that the tenant had been notified of the assignment, was not sufficient to show that he was guilty of negligence or wanting in reasonable professional skill, and allowed to the defendant the \$901.81.

*Held*, that the defendant should be allowed that amount.

Where a client refuses to pay an attorney's bill on the ground that he had been defeated and damaged by reason of the negligence and want of skill of the attorney, such negligence or want of skill must be established by him affirmatively.

A failure to succeed in a law suit is not *prima facie* evidence of negligence or want of proper skill.

APPEAL from an order of the Albany County Special Term, sustaining defendant's exceptions to the report of a referee.

This is a reference, under the statute (2 R. S., 88, 89, §§ 36, 37) of a claim made by the executors of John Magee, deceased, against the administratrix of Peter Cagger, deceased.

The facts are, that, in 1861, Mr. John Magee was the owner of certain leases known as Van Rensselaer manor leases; that Mr. Cagger agreed to act as the attorney of Mr. Magee, to collect the rents due on the leases, and to make the collections on the leases for the taxable costs; and that Mr. Magee was in no case to be personally liable for the costs of collection. Under this agreement, Mr. Cagger commenced twenty or thirty suits, on some of which collections were made, and some of which were settled, and some are still pending undetermined. Mr. Cagger was defeated in one of the cases, on the ground that the assignee had not notified the tenant of the assignment to him as required by 1 Revised Statutes (739 § 146). Mr. Cagger collected \$2,218.09. The costs of the suits in which this sum was collected was \$631.60, which was, by the referee, deducted from the amount of the collections, and judgment ordered for the balance, with interest, amounting to \$2,523.30.

Mr. Cagger died July 6, 1868. At the time of his death two suits had been discontinued and costs paid, and there were pending, undetermined, seven suits on these leases. The taxable costs in these nine suits were \$901.80. These suits were commenced without giving the tenants notice under the Revised Statutes. At the trial of this reference they were still pending. The referee refused to deduct the taxable costs in these nine cases from the amount collected, and the defendant excepted to such refusal. The plaintiffs moved for judgment on the report, and the defendant made a case and exceptions, and brought them to a hearing at Special Term at the hearing of the motion to confirm the report. The court allowed to the defendant the \$901.80, and modified the report accordingly, and from that order the plaintiffs appeal.

*William Rumsey*, for the appellants. The exceptions are based upon the proposition that the death of Mr. Cagger, the attorney of Mr. Magee, rendered it impossible for him to perform the entire service he had contracted to do, by prosecuting the actions to final



determination, and, therefore, the defendant, as his personal representative, was entitled to be credited for what services had been rendered by Mr. Cagger up to the time of his death. The rule of law is that: 1. One who, under a contract requiring his personal services, performs services valuable to the employer, but before the full performance of the service is disabled by death from completing the contract, is entitled to recover as upon a *quantum meruit* for such services as he rendered. (*Wolfe v. Howes*, 20 N. Y., 197, 203.) 2. The recovery in such a case cannot exceed the rate of the contract-price for the part of the service performed. (*Clark v. Gilbert*, 26 N. Y., 279, 283.) 3. It is also essential that the employer should have received actual benefit from the services of his agent; and where the services are worthless, no compensation can be recovered for part performance. (*Wolfe v. Howes*, 20 N. Y., 197, 203; *Clarke v. Gilbert*, 32 Barb., 576; *Fahy v. North*, 19 id., 341.) The plaintiff insists that the services in the nine actions not finished at his death were worth absolutely nothing. If, to sustain the report of the referee, it is necessary to assume that he found the fact that these services were of no value, the court will do it, if there is evidence to sustain such a finding. (*Walsh v. Powers*, 43 N. Y., 23, 27; *McKeon v. See*, 4 Robt., 449; affirmed 51 N. Y., 300.) The statute requiring the notice was one of long standing, and was peremptory in its requirements. Mr. Cagger should have known of it before he brought the actions. The notice not having been given, and the actions not being sustainable without it, there can be no possible benefit to Mr. Magee's estate from the bringing of them. (Add. on Con., 612; *Huntley v. Bulwer*, 6 Bing. [N. C.], 111; *Long v. Orsi*, 18 C. B., 610; Shear. & Redf. on Neg., § 221, and note.) When, from negligence, carelessness or inadvertence, the attorney's services are of no benefit to his client, he is not entitled to compensation. (Add. on Con., 455; 1 Pars. on Con., 116; *Hill v. Featherstonhaugh*, 7 Bing., 569; *Bracey v. Carter*, 12 Ad. & E. [N. S.], 373; *Huntley v. Bulwer*, *supra*; *Hopping v. Quinn*, 12 Wend., 517; *Bowman v. Tallman*, 40 How. Pr., 1; *Parker v. Rolls*, 14 C. B., 691; *Goodman v. Walker*, 30 Ala., 482.)

*Samuel Hand*, for the respondent.

BOARDMAN, J. :

This is an appeal from an order at Special Term modifying the report of a referee, confirming the same as so modified, and ordering judgment thereon. The mode of practice pursued in this instance is not the subject of review, since stipulations at the Special Term and upon the argument at General Term, waive all such objections and seek a review only upon the merits.

Was the learned judge at Special Term correct in modifying the referee's report and allowing the defendant the taxable costs, \$901.81, rejected by the referee? The services were in fact rendered. That is conceded. It is also conceded that the \$901.81, constitute the taxable costs in the actions brought, but not concluded by Cagger. It is in effect conceded that Cagger's services in those actions were worth \$901.81, if they were not in fact worthless. If the services were valuable to Magee, the defendant was entitled to have such value allowed her, notwithstanding the death of Cagger before complete performance. (*Wolfe v. Howes*, 20 N. Y., 197.) The amount to be allowed for such services would ordinarily be controlled by the terms of the contract. (*Clark v. Gilbert*, 26 N. Y., 279.) But cases may exist, where a failure to perform may result in such serious damage or loss as to prevent or reduce very greatly the recovery for services rendered. The plaintiff contends these services of Cagger were in fact worthless, and hence should not be allowed. The referee has not found either way upon this subject, but in his *addenda* to his report, says he has not taken into account the two actions settled without costs to either party, or the seven actions still pending. Now, I understand, from the stipulations of the parties, that the judge at Special Term took the place of the referee in deciding whether these costs ought to be allowed, and he has found, as appears by the order, that the \$901.81 was the amount of costs and disbursement proved on the trial, and allowed the same to the defendant in the accounting. That is in effect finding that such services were valuable and of the value stated. The order and the opinion together, find that Cagger was guilty of no negligence or want of proper skill, which should prevent the recovery for these services. If that be correct the order of the Special Term should be confirmed. (*Bowman v. Tallman*, 40 How., 1.) The reasoning of the judge in his opinion is quite satisfactory. No

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negligence or want of skill was proved. That should have been established affirmatively by the plaintiff. There is nothing to show what would have been the result of the seven cases pending. It does not appear that the notice to be given the tenants should have been given by the attorney, or that it was any part of his duty in the preparation or conduct of the actions. But if it were conceded that the failure to serve the notice was a fatal defect, it does not then follow that the defendant should not be allowed those costs. Failure of success in a law suit is not *prima facie* evidence of negligence or want of proper skill. (*Bowman v. Tallman, ante.*)

I conclude, therefore, that the services were rendered by Cagger; that the value of such services was \$901.81; that the defendant is entitled to have such value allowed, because it is not shown that Cagger was guilty of negligence or want of proper skill in the conduct of such actions, and that it does not appear that plaintiff or their testator has suffered any damage by reason of negligence or want of proper skill in Cagger.

The order of the Special Term is, therefore, affirmed, with ten dollars costs, and expenses of printing.

SAWYER, J., concurred. LEARNED, P. J., did not act.

Order affirmed, with ten dollars costs, and printing disbursements.

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OLIVER PORTER, APPELLANT, v. AUGUSTUS W. KINGSBURY AND CHARLES O. NEWTON, RESPONDENTS.

*Pendency of former action — plea of — relates to time of commencement of suit in which it is interposed.*

On July 7, 1875, the plaintiff herein commenced an action against the defendants upon an undertaking given by them. A demurrer interposed by them was overruled at the Special Term, but sustained upon an appeal to the General Term; and on January 3, 1876, judgment was entered therein dismissing the complaint with costs. On February 17, 1876, this action was commenced by the same plaintiff against the same defendants upon the same cause of action. March 11, 1876, the plaintiff appealed, in the first action, from the decision of the General Term to the Court of Appeals. March seventeenth the defendants

served an answer in this action, setting up as a defense that another action was pending between the same parties for the same cause of action."

*Held*, that the plea referred to the time of the commencement of the action; that, at that time, the former action had been terminated by a final judgment upon the demurrer, and was no longer pending, and that the plea should, therefore, be overruled. (BOARDMAN, J, dissenting.)

*Seemle*, that the defendant's remedy was to apply for a stay of proceedings in this action, during the pendency of the appeal in the first.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court, without a jury.

On the 7th of July, 1875, plaintiff Porter commenced an action upon an undertaking executed by the defendants Kingsbury and Newton, to recover the amount alleged to be due thereon. To that complaint defendants demurred on the grounds:

I. That the complaint does not state facts sufficient to constitute a cause of action.

II. That the court has no jurisdiction of the persons of the defendants or the subject of the action.

The issue of law, thus joined, was tried at the Cortland Special Term, September, 1875. The demurrer was overruled and defendants given leave to answer. Defendants appealed to the General Term from the order overruling the demurrer. At November term, 1875, the order of the Special Term overruling the demurrer was reversed, and the demurrer sustained, and the complaint dismissed with costs. (5 Hun, 597.) Judgment was entered dismissing the complaint with costs, January 3, 1876.

February 17, 1876, this present action was commenced upon the same undertaking set forth in the complaint in the action commenced July 7, 1875. After the commencement of this present action, viz., March 11, 1876, Porter appealed to the Court of Appeals, in the first action, from the judgment entered January 3, 1876, dismissing the complaint with costs, and gave the undertaking provided for by section 334 of the Code. March 17, 1876, the defendants answered, in this present action, setting up: "That there is another action pending between the same parties for the same cause of action as that stated in the complaint in this action" and that an appeal had been taken by the plaintiff therein.

Upon the trial the court found among other things, as follows,

viz: "the subject-matter sought to be litigated in this action is the identical subject-matter being litigated in the aforesaid action between the same parties, commenced July 7, 1875, and now pending and undetermined in the Court of Appeals."

*O. Porter*, for the appellant. The appeal brought March 11, 1876, is not good as a plea in abatement. An appeal from a final judgment at common law is the commencement of a new suit and not the continuation of an old one. It is so held in the following cases: *Gormly v. McIntosh* (22 Barb., 271), *Rice v. Floyd* (1 Comst., 608), *Enos v. Thomas* (5 How., 361-366), *Pratt v. Allen* 19 How., 450-456). The appeal may be brought and prosecuted by a new attorney without substitution. (*Pratt v. Allen*, 19 How., 450-456; *McLaren v. Charrier*, 5 Paige, 530; *Fenno v. Dickinson*, 4 Denio, 84.) At the time this present action was commenced, a right of action had accrued against the defendants upon the undertaking, and that right of action is not divested by the appeal, taken after the commencement of this action, from the final judgment dismissing the complaint in a prior action, upon the ground that it did not state facts constituting a cause of action. (*Burrall v. Vanderbilt*, 6 Abb., 70, 73; *Bowman v. Cornell*, 39 Barb., 69.) This defense arose after the action was commenced. (*Curtis v. Cobb*, 8 Johns., 470, 471; *Lowry v. Lawrence*, 1 Caines R., 69-71; *Jenkins v. Pepoon*, 2 Johns. Cases, 312.)

*Waters & Knox*, for the respondents. The subject-matter is identical, as both actions are founded upon the same undertaking to recover the same amount upon the same promise and against the same parties. The former action is pending while the appeal is pending. (4 Denio, 84; 7 Wend., 434; 21 id., 270; 25 N. Y., 485; 8 How., 140; 12 Abb., 247; 2 Duer, 611.) The pendency of another action between the same parties for the same cause is a defense, and the objection may be taken by demurrer if it appear on the face of the complaint (Code, § 144), and by answer if it do not appear on the face of the complaint. (Code, § 147; 16 Barb., 461; Gould's Pl., chap. 5, § 122, p. 283; 14 Abb. Pr. R., 206; 9 How., 228; 2 Duer, 611; 9 Paige, 296; 13 Barb., 183; 17 How., 69.)

LEARNED, P. J. :

The plea of another action pending, was an allegation that such other action was pending at the time when the action was commenced in which the plea was put in. So distinctly did the plea have reference to the time of the commencement of the action in which it was pleaded, that it was not necessary to aver that the former action was still pending at the time when the plea was pleaded, although it was customary to aver this. (1 Chitt. Pl., 454, note 2.) This matter was discussed at some length in *Commonwealth v. Churchill* (5 Mass., 174), where an old case is cited at length from the year books. And in the Massachusetts case it was held that where a defendant pleaded the pendency of a former action, and there was a replication that since the plea pleaded the plaintiff in the former action had become nonsuit, the replication was bad. The court say that it must appear that the first writ was pending when the second was purchased.

Now when this present action was commenced the former action had been terminated by a judgment for the defendant upon the demurrer. This was a final judgment, and the action was no longer pending. When, therefore, this present action was commenced there was no other pending for the same cause.

It is true that after this action had been commenced the plaintiff appealed to the Court of Appeals from the judgment in the former action. And it may be asked, what was the remedy of the defendant? It seems to me that he should have applied for a stay of proceedings in this action during the appeal in the former. In that case, if the former judgment should be affirmed (as we were informed on the argument that it had been), the present action could have proceeded. If it had been reversed, the court could have perpetually stayed proceedings in this present action.

But now the defendant has pleaded in bar the pendency of the former action, which was not pending when this action was commenced, and which (as above stated) is now finally disposed of, and the plaintiff is defeated both in this and in the former action, without having been heard on the merits.

The judgment should be reversed and a new trial granted, costs to abide event.

BOARDMAN, J. (dissenting):

If the Court of Appeals should sustain the decision of the Special Term in the former suit pleaded by the defendants in this action, the plaintiff would recover upon the same instrument now sued upon and the same amount now claimed in this action. There is, therefore, no doubt of the identity of the causes of action in the two cases. If they were pending at the same time the first action may be alleged as a reason why the second action should not be sustained. (Code, §§ 144, 147.) Until the former action is finally disposed of the second one is improperly brought. In this instance the second action was brought after the General Term had sustained the defendants' demurrer to the complaint in the first action on the ground that the complaint did not state a cause of action. If the case had stopped there no doubt the plaintiff could properly have brought this new action. But after bringing this new action the plaintiff appeals from the decision of the General Term to the Court of Appeals. By such conduct he is so situated that he may recover two judgments upon one cause of action. To prevent such a result the defendants necessarily interpose the former suit still pending by virtue of the plaintiff's appeal to the Court of Appeals. It is not deemed of importance that the appeal was taken in the first action after the second action was begun. The alleged defense existed when the answer was put in, and was properly included therein. The plaintiff, by his own act, had rendered it not only proper but necessary that such defense should be interposed. The plaintiff should have continued the pursuit of his rights under the first action or, abandoning that, brought the present action. He had an election which course to pursue, but the law would not and ought not to tolerate both. If the second action can be permitted at all, the proceedings in it should have been stayed until the Court of Appeals had finally disposed of the former action. Neither party asked this upon the trial. Both, apparently, sought a trial of the issue. As the plaintiff did not ask that the action should stand over, nor the defendant ask for a stay until the decision of the Court of Appeals, nothing remained for the court but to try the issue. On the facts found (and they are conceded) it is difficult to see how the learned judge could find otherwise than he did. It is evident the same relief sought in this action might be afforded by the Court of

Appeals in the former action, and that until the termination of the former action *adversely to the plaintiff*, he ought not to be permitted to pursue to judgment another and different remedy. These views are sustained, in my judgment, by the following cases: *Fenno v. Dickinson* (4 Den., 84), *Nones v. Homer* (12 Abb., 247), *Traver v. Nichols* (7 Wend., 434), *Groshon v. Lyon* (16 Barb., 461), *Robinson v. Plimpton* (25 N. Y., 484), *Johnson v. Yeomans* (8 How., 140).

It is believed the decision at Special Term is correct and the judgment should, therefore, be affirmed with costs.

Present — LEARNED, P. J., BOARDMAN and SAWYER, JJ.

Judgment reversed, new trial granted, costs to abide event.

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JANE W. BOCKES AND OTHERS, APPELLANTS, v. ELEANOR LANSING AND OTHERS, RESPONDENTS.

*Action in equity to remove a cloud on title — when not maintainable — Remedy by ejectment.*

The plaintiff herein claimed that one George Webster, the owner of a house and lot described in the complaint herein, on September 26, 1846, made a general assignment of all his property, including the house and lot in question, to one Russell, who, on May 6, 1847, conveyed the same to Simeon D. Webster; that thereafter, and on July 6, 1859, the said George and Eleanor, his wife, conveyed the said premises to the said Simeon D.; that the plaintiff had succeeded to the rights of the said Simeon D.; that on April 18, 1861, a receiver, appointed in supplementary proceedings instituted by a judgment creditor of George Webster, sold the said land to one Humphrey, through whom the defendants, who are in possession thereof, claim title.

This action was brought to have the receiver's deed set aside as irregular, and canceled, and for an accounting as to the rents and profits received by the defendants. *Held*, that the facts of the case would not sustain an action in equity, such as the present one, to set aside the deed as a cloud upon plaintiff's title; but that the plaintiff's remedy, if any, was by ejectment.

APPEAL from a judgment in favor of the defendant, entered on the report of a referee.



On September 23, 1846, George Webster, the owner of the house and lot described in the complaint, executed to David Russell a general assignment of all his property for the benefit of his creditors. On the 6th of May, 1847, David Russell, the assignee, conveyed the premises to Simeon D. Webster, a son of George Webster, by deed executed that day and recorded June 12, 1847.

At the time of the assignment George Webster was indebted, among others, to Joseph S. Keeler, who, on the 19th of October, 1846, recovered judgment in the Supreme Court thereupon for \$1,057.07. This judgment was assigned to David H. Humphrey, on February 21, 1861, for fifty-five dollars, paid by him, and Humphrey instituted supplementary proceedings thereupon, which resulted in the appointment of a receiver, to whom George assigned all his property, and on the 18th of April, 1861, the receiver was duly authorized to sell the premises in question at public or private sale, with or without notice, and did convey the same to said David H. Humphrey on the 25th of April, 1861, at private sale and without notice, for the consideration of \$2,000, and on the 30th of April, 1861, Humphrey conveyed the same for fifty-five dollars to Eleanor, the widow of George Webster, both deeds being recorded May 4, 1861.

Eleanor Webster died in possession of the premises and the personal property, July 26, 1872, and the defendants own her interest in the premises, while the plaintiffs represent Simeon D. Webster's interest therein. The plaintiff also claimed title by virtue of a deed executed by George Webster and Eleanor, his wife, dated July 6, 1859. The referee held, however, that such deed was only valid to transfer the dower right of the wife.

The plaintiffs claimed that the proceedings instituted in 1861, which resulted in the appointment of the receiver, were irregular for the reason that the lien of the Keeler judgment had expired as to Simeon D. Webster, a purchaser in good faith, at the time the proceedings were instituted, and prayed "that the said order of the Supreme Court authorizing the said receiver, as such, to sell and convey the said premises; the sale and conveyance thereof to the said Humphreys, and the conveyance thereof by the said Humphreys to the said defendant may, by the judgment of this honorable court, be adjudged a fraudulent and inequitable cloud upon the title of said plaintiffs to said premises; that the same may be ordered to be

canceled of record, and declared null and void, and of no force or effect; that the said defendant may be perpetually enjoined from using the same or the record thereof for any purpose or under any pretense whatever; and that in the meantime the said defendant may be restrained from selling, incumbering or disposing of the said premises, or any interest therein, or leasing the same, or any part thereof, till the further order of the court; and that an account may be taken, by and under the direction of this honorable court, of the mesne profits of said premises since the termination of the tenancy at will therein of the said defendant, and that the said defendant may be adjudged to pay the same to the said plaintiffs, and that the said defendant may be compelled to release to the said plaintiffs all or any right or title she may have obtained to said premises by or under the fraudulent, collusive and inequitable proceedings had as aforesaid, and pay to said plaintiffs their costs in this behalf, or that such other or such further relief in the premises may be granted as shall seem meet to this honorable court."

The referee held as matters of law that the assignment was void on its face; that Simeon Webster was not a purchaser in good faith; that the lien of Keeler's judgment had not expired because Simeon was not a purchaser in good faith; that the receiver in supplementary proceedings was not bound to bring an action to set aside the assignment, because there had never been any change of possession and because the assignment was void on its face; that if the receiver's title was imperfect, the plaintiffs' was no better, and defendant being in possession would continue to hold it; that if the proceedings on the Keeler judgment were irregular, still this action cannot be maintained because such proceedings would constitute no cloud on plaintiffs' title; that such proceedings were regular and gave title, and that plaintiffs have no cause of action.

*James Gibson*, for the appellants.

*James Lansing*, for the respondents.

LEARNED, P. J. :

The plaintiffs, successors to the title of Simeon D. Webster, claim to own the land in fee by virtue of conveyances from George

Webster. The defendants, who are in possession, claim title by virtue of supplementary proceedings against George Webster and in favor of a creditor of his, taken subsequently to the time of the execution of the conveyances under which the plaintiffs claim.

This is a case then, as it seems to me, where the plaintiffs' remedy was by ejectment. But the present action is brought in equity to set aside the proceedings supplementary and the conveyance by the receiver and his grantee under the same, through which the defendants claim, as a cloud on the plaintiffs' title, etc., and for an accounting of the rents and profits, etc. I do not think that this action can be maintained. Whether the judgment under which these proceedings were taken had, or had not, ceased to be a lien, was a matter for George Webster to litigate; not for the plaintiffs. The plaintiffs (and Simeon D.) claimed adversely to George; and they had no right (nor had Simeon D.) to notice of proceedings which were to have the effect solely of transferring to some creditor whatever property George Webster then had.

If the plaintiffs' title was good, it was of no consequence to them, or to Simeon D., what proceedings should be taken against George. If their title was not good, then they and Simeon D. had no interest in the matter of the proceedings. And if the plaintiffs urge, that while George could not dispute their title, as void against his creditors, yet that his creditors might, the reply is that, if the plaintiffs have a good title they can recover in ejectment. If not, they should not recover in any action.

It may be said that all the facts appear in this case, and therefore that the court should give relief, without regard to the form of the pleadings. But that remedial rule is not to be carried to this extent. A plaintiff is not to sue on a promissory note and recover for an assault and battery. The action of ejectment is distinct. It is for the recovery of the possession of land and thus for establishing the title. The present action is solely an action in equity, such as might be maintained, in a proper case, by a party in possession to remove a cloud.

The plaintiffs may urge that George Webster continued in possession as tenant of Simeon D., and that hence the defendants are to be deemed tenants of the plaintiffs. That does not alter the case. The defendants are holding, or claiming to hold, adversely;

and the plaintiffs should dispossess them by suit or by some proper proceeding.

I do not mean to express any opinion whatever as to the validity of the assignment, or as to the title which Simeon D. obtained by the conveyance from Russell, or by the direct conveyance from George or upon the merits in any particular. And in the view above taken it is unnecessary to examine any questions as to the admission of evidence or the conclusions of fact. The judgment should be affirmed with costs; but this must be without prejudice to any action of ejectment, should such action be brought by the plaintiffs.

SAWYER, J. (dissenting):

Without attempting to pass upon all of the numerous questions raised by this appeal, it is apparent that there must be a new trial for errors in the court below in the reception and rejection of evidence.

All of the parties to this action claim under George Webster as the common source of title; the plaintiffs under deeds executed by him; the defendants through Eleanor Webster, who claims under a receiver's deed in proceedings supplemental to execution upon a judgment against George Webster, her husband. Both George and Eleanor Webster at the time of the trial were dead.

On the trial the plaintiffs offered in evidence a deed from George Webster and Eleanor Webster, dated April 30, 1859, to Simeon D. Webster, through whom plaintiffs claim as a part of their chain of title. This was objected to and the referee held it inadmissible under the pleadings, except to show a release of Eleanor's inchoate right of dower, and confined its force and effect to that alone.

In the complaint the plaintiffs allege that the judgment under which defendants claim, had ceased to be a lien upon any real estate of the said George Webster as against David Russell, a purchaser and grantee of George Webster, "and as against Simeon D. Webster, a purchaser from the said David Russell, and also from the said George, by deed executed April 30, 1859, in good faith."

These allegations we think amply sufficient to require the reception of the deed in evidence for all purposes, and that the limitation imposed and acted upon by the learned referee was error.

Again, the defendants called as a witness David H. Humphries, the grantee of the receiver, in the deed executed by him, and the grantor in the deed to Eleanor Webster, and under which conveyances the defendants claim title to the premises, in hostility to plaintiffs' title, and offered to prove by the witness communications made to him by George Webster in his life-time, tending materially to affect injuriously plaintiffs' title and strengthen the defendants'. This evidence was objected to by the plaintiffs' counsel, on the ground that the witness was incompetent under section 399 of the Code. The objection was overruled and the evidence received. Under the construction given to this section of the Code by the Court of Appeals, in *Mattoon v. Young* (45 N. Y., 696), and by this court, in *Richardson v. Warner* (13 Hun, ante, p. 13), the witness was clearly incompetent and his evidence inadmissible; he had owned and transferred the very title under which the defendants claim.

The findings of the referee show that this evidence must have materially affected his decision, and without passing upon the other questions raised, I am of the opinion that the judgment should be reversed, the reference discharged, and a new trial ordered, costs to abide the event.

Present—LEARNED, P. J., BOARDMAN and SAWYER, JJ.

Judgment affirmed, with costs.

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DANIEL A. BULLARD, APPELLANT, v. THE SARATOGA VICTORY MANUFACTURING COMPANY, RESPONDENT.

*Mill owners—rights of, as to detention of water.*

The defendant was the owner of a dam, and drew therefrom water to run his mill, and the plaintiff drew water from a dam situated on the same stream, below that of the defendant. The surplus waters from defendant's dam was sufficient to furnish the supply needed for the plaintiff's mill, except in times of drought, when defendant was obliged to shut the gates of his mill during the night to accumulate a supply for the next day, thereby cutting off the sup-

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ply from plaintiff's mill during the time defendant's reservoir was filling. Defendant's mill was run only during the day, while that of plaintiff was run night and day. In an action brought to restrain the defendant from cutting off the flow of water during the night, the referee found that the detention was necessary, and for the sole purpose of enabling the defendant to propel its machinery during the day, and that such detention and use of the water was reasonable. *Held*, that the injury sustained by the plaintiff, by reason of such detention, was one for which the law afforded no remedy.

The plaintiff was only entitled to the use of a limited quantity of water. *Held*, that it rested upon him to show that the quantity used by him was less than that to which he was entitled.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

The action was brought to restrain the defendant from the use of certain appliances, by means of which it is enabled to maintain at its mill a uniform flow of the waters of Fish creek throughout the entire year, and for damages. The plaintiff runs a paper mill propelled by water from this creek, and the defendant owns and operates a cotton factory about one mile above him on the same creek. The plaintiff claimed that the defendant wrongfully and unreasonably detained the water of the creek at its mill, and sought to prevent and restrain it from so doing.

*E. Fitch Bullard*, for the appellant.

*Edgar L. Fursman*, for the respondent.

BOARDMAN, J. :

In *Clinton v. Myers* (46 N. Y., 517, 518) the Court of Appeals adopts the rule as held by the Supreme Court of Massachusetts in *Gould v. Boston Duck Company* (13 Gray 442). GROVER, J., states the doctrine of that case, thus: "A party has a right to erect a dam across a stream upon his land, and such machinery as the stream, in its ordinary stages, is adequate to propel; and if the stream, in seasons of drought, becomes inadequate for that purpose, he has the right to detain the water for such reasonable time as may be necessary to raise the requisite head, and accumulate such a quantity as will enable him to use the water for the purpose of his machinery." Farther on it is said: "By so doing the party is not

liable to an action by an owner below, whose machinery does not require for its operations all the water at an ordinary stage, but only such as naturally flows during seasons of drought, though to some extent injured by being deprived of the natural flow."

It is believed these principles are applicable to this case and are fatal to the plaintiff's right of recovery. It is not controverted that defendant had the right to erect dams and to utilize the natural reef of rock as dams in the manner in which it has been done. The machinery of defendant was beyond doubt of just proportions to the size of the stream in its ordinary stages of water. For about nine months of the year the ordinary flow of water would be sufficient to carry defendant's machinery for twenty-four hours in each day. During seasons of drought it was inadequate and the machinery could only be propelled during the day time by retaining the water in reservoirs during the night, for the next day's use. This the defendant has done and has thus made an advantageous use of the water. The plaintiff, desiring to run his paper mill day and night, is, in seasons of drought, thus deprived of water for a short time, while defendant's ponds are filling up. This is an injury for which there is no remedy, if the detention is necessary to the defendant's reasonable use and enjoyment of its mill privilege above. The learned judge at Special Term has found that the detention was for the sole purpose of enabling the defendant to use the water to propel its machinery, and that the water has not been unreasonably detained or discharged, and the use by the defendant of such water has been, and is, reasonable. If these conclusions of facts are warranted, it is an end to plaintiff's case. There is an abundance of evidence to sustain them. Indeed, I do not well see how it is possible to find otherwise.

The plaintiff, however, insists that the defendant should not close its gates at night entirely, since a part of the water might be allowed to flow through the gates and still enough be detained to fill defendants reservoirs before morning. I think the argument is more specious than sound. I know of no rule of law creating such an obligation on the upper owner. But the idea is quite impracticable. The power of saving just so much water as will suffice to fill the reservoirs, depends on the amount of water passing. That amount

varies from day to day. The defendant has observed the law if he has not unreasonably detained the waters. What form of instructions could the court give, founded on the partial opening of defendant's gates? How much should they be left open? What kind of a sliding scale could be inserted into an injunction order that would be just to plaintiff and defendant and yet capable of observation? What evidence is there in the case to justify or establish any such direction? No; the whole project is experimental, indefinite, uncertain and incapable of any practicable application. It would be of no service except to breed law suits. (13 Gray, 442.) I do not deem it necessary to say more on this point. The opinion of the learned judge on the trial is quite satisfactory and conclusive.

There is another suggestion having great force, apparently. The plaintiff by his deed is only entitled to a specific quantity of water. There is no evidence in the case that he has not at all times had as much water as by his deed he is entitled to. The defendant charges that the plaintiff uses a much greater amount than he has any legal right to; that such amount is necessary to run his machinery, and hence in times of drought he suffers for the want of such excessive quantity, while the ordinary leaking and flow from defendant's reservoirs and dams, would give him all that he could legally claim. The decision contains no findings of fact upon this point, nor do I find in the evidence the necessary means for determining it. It would seem, however, quite clear that the plaintiff ought not to recover, if he receives and uses or can use all the water to which he is entitled by the terms of his conveyance. The plaintiff, to establish his cause of action, should prove the deficiency. He has not done so. (*Gould v. Boston Duck Co.*, 13 Gray, 442; *Tourtellot v. Phelps*, 4 id., 370; *Bigelow v. Battle*, 15 Mass., 313; *Hetrich v. Deachler*, 6 Penn., 32.)

There are no exceptions on the admission or rejection of evidence that call for an examination. I think all such rulings were correct. But in equity cases courts rarely disturb a judgment by reason of the admission of improper evidence, or on account of the questions being objectionable as leading. In the present case the evidence objected to is inappreciable in its amount and in its effect. The same facts are proved elsewhere without objection, and indeed are substantially conceded throughout the trial.



We think the judgment is eminently right and proper, and should be affirmed, with costs.

LEARNED, P. J., and SAWYER, J., concurred.

Judgment affirmed, with costs.

ELIJAH B. SMITH AND THE FIRST NATIONAL BANK  
OF ELMIRA, APPELLANTS, v. JOHN T. RATHBUN AND  
NEWTON P. FASSETT, EXECUTORS OF SIMEON BENJA-  
MIN, DECEASED, AND JOHN T. RATHBUN, RESPONDENTS.

*Judgment on demurrer — order refusing, not appealable — Amendments to pleadings  
— power of referee to allow — Duty as to return of pleading.*

An order of the Special Term denying a motion for judgment on the ground of the frivolousness of a demurrer, is not appealable to the General Term. \*

A referee has the same power to allow amendments as the court upon the trial of an action.

Such amendments may be allowed either to meet an immaterial variance between the pleadings and the proof, or for any other purpose, provided it does not change substantially the cause of action or defense.

When a party claims to be taken by surprise, or misled to his prejudice, by the amendment, proof of such facts must be furnished; without such proof the variance will not be deemed material.

A referee is not obliged to wait until all the evidence is introduced before allowing an amendment to cure a variance, but may permit such amendment to be made at the commencement of the trial, so as to make the pleadings conform to the evidence which the party proposes to introduce.

Where a referee allows a plaintiff to amend his complaint by adding thereto allegations which do not substantially change the cause of action set forth therein, he cannot allow the defendant, who has theretofore answered, to interpose a demurrer thereto.

Where a referee has allowed a defendant to serve a demurrer to a complaint so amended, the plaintiff is not confined to an appeal from the order of the referee, but may move at Special Term to have the demurrer stricken out.

Rule 26 does not apply to such a case, and the plaintiff is not obliged to return the demurrer.

Although the terms upon which an amendment is allowed rest in the discretion of the referee, yet if he impose terms which he has no authority to impose, it ceases to be a matter of discretion, and his mistake may be corrected.

\* Such an appeal is expressly forbidden by section 537 of the Code of Civil Procedure. — [REP.]

APPEAL from an order denying a motion to set aside a demurrer, served during the trial of the cause, as irregular and unauthorized, or to adjudge it to be frivolous.

The action was commenced in 1869 by Elijah B. Smith, as sole plaintiff. The complaint alleged, among other things, "that in or about the month of November, 1863, a banking association and corporation, known as the First National Bank of Elmira, was organized and incorporated and commenced doing business in the city of Elmira, in pursuance of an act of congress passed February 25, 1863, and had continued to do banking business at Elmira, aforesaid, ever since under said act, and the amendatory and subsequent acts of congress authorizing such banking; that the capital stock consisted of 1,000 shares of the nominal or par value of \$100 each; that the plaintiff in this action, at the time of the organization of said bank, owned, and still owns, fifty of said shares; that from the time of the first organization of said bank until in October, 1867, Samuel R. Van Campen was the president, one Simeon Benjamin was vice-president and the defendant John T. Rathbun was a director of said bank; that until in or about the month of October, 1867, the business of said bank was profitable, the shares of stock greatly increased in value, and became and were of the market value of \$150 each.

And on his information and belief the plaintiff further says and charges, that in and prior to 1867 the said Van Campen, in violation of his duty as president of said bank, and contrary to law, loaned from the funds of the said bank to divers individuals and to insolvent persons, without sufficient security, large sums of money, "exceeding at times one-tenth of the capital of the bank, whereby the said bank sustained great losses; and that he, the said Van Campen, borrowed, or took, from the funds of the bank for his own private use, and appropriated to his own use large sums, varying from \$1,000 to \$75,000 at a time; that he was insolvent at the time and unable to pay his debts; that he, the said Van Campen, as such president, made untrue quarterly reports of the condition and resources of the bank, representing worthless securities, or securities of little value, transferred by himself to the bank, to be other and valuable securities, and so reporting the same; and that the said Van Campen, as such president, was guilty of other acts of misconduct, of all of which the plaintiff was ignorant, whereby, and by

reason of the acts before mentioned, the said banking association sustained great losses and the said shares of stock became, and were and now are, of little or no value.

"And on his information and belief the plaintiff further says, that the said Simeon Benjamin and John T. Rathbun, while such officers of said bank, in and prior to 1867, were informed and knew of the doing of the said wrongful acts by the said Van Campen, that he had thus violated, and was violating, his duty as such officer of the bank; that they negligently permitted and allowed him to do and aided, countenanced and assisted him in so doing and concealed the facts from the plaintiff and other stockholders, and allowed and permitted and assisted the said Van Campen to so draw out, loan and use and waste the funds and property of said association, the said bank, and to remain and act as president thereof and thus defraud and injure the plaintiff, whereby the plaintiff has sustained damages to the amount of \$6,888.44, with interest thereon from July 27, 1867, when dividends were last paid on said shares of stock."

The defendants Rathbun and the executors separately demurred to the complaint. The court at Special Term overruled the demurrer. From the order entered thereon the defendant appealed to the General Term, where that order was reversed with leave to plaintiff to amend by adding, or bringing in, the First National Bank as a party on payment of costs, which was done. The defendants then moved at General Term to change or modify the order by striking out the bank as a party, which motion was denied.

The amended complaint having been served the defendants answered it; and the cause being thus at issue on the defendants' answer was, by consent, referred to the Hon. Sterling G. Hadley, as sole referee, to hear and determine the same.

On the 20th of November, 1876, the cause was brought to trial before the referee. On the second day of the trial the plaintiffs asked to amend their complaint by adding after the words "Simeon Benjamin was a vice-president" the words "and a director."

The defendants' counsel objected, but the referee allowed the amendment. No amended complaint was made or served; but the defendants' counsel, then, before any further testimony was taken, in pursuance of an order of the referee, served upon the plaintiffs' attorney a demurrer, by or for both defendants, to the whole com-

plaint. Plaintiffs' attorney insisted, at the time, that defendants had no right to serve the demurrer at that stage of the case, or because of that amendment, and gave notice that he should move to strike it out or set it aside.

The referee, then, against the remonstrances of plaintiffs' counsel, adjourned, or suspended, the trial of the cause to await such disposition as might be made of the demurrer.

Before the expiration of twenty days the defendants' counsel served, by mail, an amended demurrer. The plaintiffs' attorney immediately gave notice that he declined to accept or receive it, or to recognize the right of the defendants' attorneys to serve it; and on the papers in the case showing the above facts the plaintiffs' counsel made a motion to strike out or set aside the demurrer as irregular or unauthorized, or in case the court should refuse to strike it out or set it aside, then that the demurrer be adjudged frivolous.

The court denied the motion to strike out, and also refused to adjudge the demurrer frivolous.

From that decision and every part of the order this appeal was brought.

*E. H. Benn*, for the appellants.

*H. Boardman Smith*, for the respondents.

BOARDMAN, J.:

The questions arising upon this appeal involve, first, the nature and effect of the amendment to the complaint and the power of the referee to allow it, and, second, the regularity and validity of the demurrer. The question as to the frivolousness of the demurrer cannot be considered here. That has been passed upon by the Special Term, and its decision is clearly not appealable. (*Dabney v. Greeley*, 12 Abb. [N. S.], 191.)

It is clear that the referee had power to allow the amendment in either of two cases: First, if it was to meet an immaterial variance between the pleadings and the proof (Code, §§ 169, 170); second, if it did not change substantially the cause of action. (Code, § 173.) To decide whether the amendment falls within

these cases we must consider the nature of the complaint. The gist of the complaint is, that the defendants "negligently permitted and allowed" the president to do the wrongful and fraudulent acts set forth, "and aided and countenanced and assisted him in so doing," by reason whereof the plaintiffs were damaged in their property. It alleges, therefore, both negligence and fraud. Now we might consider both of these allegations as being, in effect, but one cause of action; and this seems to have been the view taken by the court in the decision of the former demurrer. (66 Barb., 402.) It is there said "the acts set forth in the complaint are fraudulent acts." And again, "I am also inclined to hold, that when directors \* \* \* knowingly and in violation of their duty commit fraud, \* \* \* or knowingly allow it to be done by one or more of their associates or chosen officers, they become answerable *individually* to stockholders or other beneficiaries of the fund, on the basis of fraud." It is plain, I think, from this language, that while the court puts the responsibility on the basis of fraud, it means by "fraudulent acts," not merely acts fraudulent *per se*, but also, willful negligence, in permitting and allowing such acts. I do not think, therefore, that the decision will bear the construction put upon it by the defendants' counsel, viz., "that a part of the directors of a corporation may" be sued by the stockholders for fraud, but *not* for negligence. Whether the acts complained of were fraudulent or only willfully or knowingly negligent, the gist of the allegation is, that they were wrongful, tortious acts, based upon fraud, and for which the guilty person was responsible in damages. But suppose that these are separate causes of action; they were none the less alleged in the complaint before the amendment was made. The most that can be said is, that they were not properly separated; and that the cause of action for negligence was defectively and incompletely stated. It cannot be said that it was not stated at all. Now the amendment was made to remedy this defect, to complete and fill out the cause of action which the plaintiff intended and endeavored to allege, but did not allege in full. There was no new cause of action alleged nor any radical change made in the issue presented. It follows, therefore, that this amendment might be allowed, either as an allegation which did not change substantially the cause of action, or as an amendment to meet a variance between the plead-

ings and the proofs that plaintiffs expected to introduce. The amended complaint could have been met on the trial by a corresponding amendment to the answer not introducing a new defense, thus effectually protecting defendants' rights, and the trial could have proceeded. But if defendants were taken by surprise or were misled to their prejudice, they had a remedy, viz., to make proper proof of that fact, and thereupon they would have been entitled to an adjournment and upon application to the court, to the privilege of answering or demurring. Such proof is indispensable. Without it no variance will be deemed material. (*Callin v. Gunter*, 10 How., 315; S. C., 11 N. Y., 368.) No such proof was made in the present case.

But defendants claim that this was not a case of variance at all. They do not rest this claim upon the ground that the cause of action is unproved in its entire scope and meaning, so as to be deemed a failure of proof under section 171 of the Code, but upon the ground that no proof was made upon the trial that Mr. Benjamin was a director. Evidence, however, was repeatedly offered to show that Mr. Benjamin was a director, and it was excluded by the referee because the fact that he was a director was not alleged in the complaint. It was to meet this state of things that the amendment was made. The referee was not obliged to wait until all the evidence was in before allowing the amendment; he could make it also before the evidence began, so as to make the complaint conform to the proofs the plaintiffs proposed to introduce. Such an amendment was made in *Therasson v. Petersen* (22 How., 98), and the court, on appeal, held that it was proper.

If the foregoing views are correct, the defendants had no right to demur arising from the nature or effect of the amendment. It introduced no new cause of action; it did not change substantially the issue involved, and it did not surprise or mislead the defendants to their prejudice. This conclusion is supported by the case of *Therasson v. Petersen* (*ante*). In that case the answer was amended on the trial to meet the proofs defendants expected to introduce. Plaintiffs made no proof of surprise or prejudice, but merely proposed to demur to the amended answer on the ground of insufficiency. Leave to demur was refused; and upon appeal, the General Term sustained the refusal.

But it is said that the amendment was "in matter of substance," and that under 2 Revised Statutes (Edm. ed., 442, § 2), the defendants were entitled to answer, and by implication, to demur. This provision of the Revised Statutes is, no doubt, still in force, but it must be construed in connection with the subsequent provisions of the Code. The cases cited by defendants' counsel do not sustain their position. In *Harriott v. Wells* (9 Bos., 631) the judge at Special Term says: "the right to answer amendments under the chancery system was absolute," but speaking of the practice under the Code, he says: "If the variance was immaterial no amendment was necessary. If made under section 170 of the Code no amendment was necessary or proper. But if, under section 173, the amendment substantially changed the claim, the amendments were necessary and could only be allowed (if) at all by the court" (that is, at the Special Term), "and then a right to answer must exist." (Page 633.) That case was tried before a referee, and the amendment allowed by him substantially changed the claim. The complaint was on a sealed contract and averred a strict performance of all the conditions necessary to establish a cause of action. The proof showed failure in the performance of a condition precedent, and plaintiff gave evidence to show a waiver by defendants of this condition. The referee allowed plaintiff to amend by alleging this waiver; that is, he allowed him to allege a new parol contract, thus changing substantially the issue. Defendants asked to amend by setting up a new defense to this new issue, viz., the statute of limitations, whereupon the referee referred the whole matter to the Special Term. It is plain that the referee erred in allowing the amendment. He would have erred still further if he had allowed the new defense. But the Special Term allowed the new defense, and the General Term affirmed its decision. With this decision we have no fault to find. The Special Term has the power to allow a new cause of action, or a new defense, but a referee or the court, on the trial, has not. (*Ford v. Ford*, 53 Barb., 525.) In the case of the *Union Bank v. Mott* (19 How., 267; S. C., 11 Abb., 42), also cited, the amendment introduced a new cause of action. It was allowed by the referee, but his order was set aside by the court at Special Term. The court then, on motion, allowed the amendment to be made, but in the absence of cause shown, did not allow the defendants to answer anew or to

demur. The General Term, however, on appeal, allowed them to answer. These are the principal cases cited by defendant's counsel in this connection. Instead of supporting his position they bear distinctly against it. If we are to construe the provisions of the Revised Statutes in question in accordance with these and the other decisions under the Code, I think an amendment "in matter of substance" must be taken to mean where there is a material variance, or a new cause of action alleged, or a substantial change made in the claim, and that even then leave to answer will be given only on application to the Special Term. In the case of a trial before a referee there are still other reasons why a demurrer should not be allowed. It does more than introduce a new defense; it changes the issue from one of fact to one of law, strikes out the answer, and, in effect, vacates the order of reference, for there is no issue of fact left for the referee to try.

A question is made in this case, whether the referee actually gave the defendants leave to demur, and a mass of affidavits is introduced upon either side. Defendants claim that he did, at the same time that he gave leave to amend the complaint. This the plaintiffs deny. I am satisfied, upon examination of these affidavits, and from the stenographer's report, that the referee intended to give and, as matter of fact, did give leave to demur. In view, however, of the conclusion arrived at, it does not seem to me of much importance. If he did not, the demurrer is clearly unauthorized. If he did, the conclusion defendants seek to draw, that, therefore, the demurrer is neither unauthorized nor irregular, and must be sustained, does not follow; for he exceeded his authority so palpably that his order must be disregarded. The same considerations dispose of the view that leave to amend the complaint was given, only upon condition that defendants should have leave to demur, and that the terms upon which the amendment should be granted were discretionary with the referee and not subject to review. But the discretion of a court or referee is not purely arbitrary. It must be regulated by legal principles, and it can be exercised only within the limits prescribed. When it is said that a referee may impose terms in his discretion on allowing an amendment, it merely means that he may do so within his lawful powers. If he exceeds his authority and imposes terms he has no lawful power to impose, it ceases to be a matter of discretion, and his mistake may be corrected.



Have the plaintiffs mistaken their remedy? Defendants insist that they should have appealed from the order of the referee instead of moving to set aside the demurrer. There is no doubt that an appeal would be the most regular course to take, but it is not the only course. In *Ford v. Ford* (53 Barb., 525), it is held, that where an order is made by a referee which he has no authority to make, the aggrieved party is not restricted to an appeal for redress, but is entitled to a more expeditious and less expensive mode, viz., he may move, at Special Term, to set it aside. The same reason given applies in the present case, and I see no good cause why the plaintiffs should not be allowed to move to strike out the demurrer, more especially as it is in effect the same as moving to set aside the order. It is asking that the order be disregarded. At least it does not seem to me to be so irregular as to justify us in holding that the motion ought to have been denied on that account.

The objection that plaintiffs ought to have returned the demurrer to defendants' attorneys is not well taken. Rule 26, cited by counsel, has no application whatever. That has reference to pleadings or other papers objected to either because they are not folioed or not legibly written, or because they are letter-press copies; and the provision is that they must be returned within twenty-four hours or the objection will be considered waived. The case of *Rogers v. Rathbun* (8 How., 466), also cited, held that an amended complaint which the defendant proposed to disregard ought to have been returned, or notice given to the plaintiff that defendant intended to disregard it as unauthorized. Now, in the present case, the plaintiffs gave notice on the trial that they considered the demurrer as unauthorized, and again, immediately upon the receipt of the amended demurrer, plaintiffs' attorney wrote to defendants' attorney that he should disregard it as unauthorized. Besides, I think the plaintiffs had a right to elect whether they would return it and treat it as an absolute nullity, or move at Special Term to strike it out. (*Fredericks v. Taylor*, 52 N. Y., 596.)

It is not necessary to consider defendants' preliminary objections to the affidavit of the referee. The only question affected by it, viz., whether leave to demur was given by the referee, has been decided in defendants' favor.

In any view of the case I think the demurrer is irregular as to

the defendant Rathbun. The original complaint alleged that he was a director, and the amendment did not and could not affect the cause of action alleged against him. It affected only the executors of Benjamin. If the considerations hereinbefore stated are just, the demurrer was equally illegal and invalid as to the executors of Benjamin. The amendment allowed to the complaint was not of a character to change the cause of action. It was not a material variance. The referee had, therefore, the power to allow it. But it did not follow, nor was it true, that the defendants, for that reason, had the right to answer or demur of course. The referee had not the power to grant the defendants that privilege, and no case was made by virtue of which they could apply to the court therefor.

We conclude, therefore, that the order of the Special Term should be reversed, with ten dollars costs and expenses of printing, and the demurrer to the complaint, as amended on the trial, should be stricken out as irregularly and improperly interposed, with ten dollars costs of the motion to plaintiffs.

LEARNED, P. J. :

Concurring with the views of my brother BOARDMAN, I remark that the power of the referee to allow amendments is that possessed by the court "upon such trial." This does not mean a change of the issue from one of fact to one of law. The referee should have amended the complaint as requested; should have amended the answer (if any amendment was rendered necessary by this mere insertion of the word "director") and should have proceeded with the trial. There could have been no surprise on the defendants. They well knew the fact that Benjamin was a director. Indeed their affidavits show that they had looked forward to the possibility of such an amendment.

The object of this freedom of amendment is to facilitate the trial of the facts, not to afford opportunities for delay.

Present — LEARNED, P. J., and BOARDMAN, J.

Order reversed, with ten dollars costs and printing disbursements, and motion granted with ten dollars costs.

JAMES HORTON, RESPONDENT, v. ELMON HOWE, APPELLANT.

*Subscription for making fair grounds—destruction of grounds—right of action accruing to subscriber.*

The plaintiff and others signed a paper whereby they promised and agreed to pay to the defendant the sum set opposite their names, such subscription being for the purpose of defraying the expenses of grading, fencing, etc., a fair ground upon land belonging to defendant. The instrument provided that the subscribers should, when the net receipts of the grounds amounted to the sum subscribed by each, receive back in full the amount subscribed. Thereafter, the plaintiff paid fifty dollars to defendant, and received from him a receipt, entitling plaintiff to the privilege of driving upon the track at all times, unless the amount so subscribed was repaid.

Defendant subsequently ploughed up and planted trees on the track, and constructed another one at a different place on his farm. In an action by the plaintiff to recover the amount paid by him, *held*, that it was not necessary for all the subscribers to join in the action, but that each might maintain a separate action.

That it was not necessary for the plaintiff to prove any special damage sustained by the breaking up of the track, but that he was entitled, in view of the fact that that sum was to be paid to him out of the net receipts of the grounds, to recover the full amount of his subscription.

APPEAL from a judgment of the County Court of Otsego county in favor of the plaintiff, entered upon a verdict directed by the court. This action was brought by the plaintiff to recover the sum of fifty dollars, subscribed by him in pursuance of the following agreement :

“For value received, and in consideration of the covenants hereinafter mentioned, we, the subscribers, hereby promise and agree to pay unto Elmon Howe the sums set opposite our respective names by the 1st day of July, A. D. 1867. Said subscription is for the purpose of raising funds to defray the expense of grading, fencing and of fixing all other necessary appurtenances for a fair ground to be located upon the farm of Elmon Howe, in the town of Worcester, county of Otsego and State of New York, upon the farm now occupied and owned by said Elmon Howe.

“The express condition of this subscription is, that the persons hereby signing this subscription, and hereby donating to the said

enterprise, shall, when the net receipts of the grounds amount to the sum subscribed by each, receive back in full the amount hereby given and subscribed by them, if requested; and further agree that said persons hereby signing this instrument are to receive back from said Elmon Howe at any time he, the said Elmon Howe, may wish to refund to each the sum so subscribed; and said track not to be used on Sunday and in damp and muddy weather, and at all other times when the subscribers wish.

“Dated WORCESTER, *May 4*, 1867.”

On August second he paid the fifty dollars and received the following receipt:

“WORCESTER, *August 2*, 1867.

“This is to certify that James Horton has this day paid to Elmon Howe fifty dollars, which is the amount of his subscription to the pleasure grounds, to be situated upon the farm of Elmon Howe; which amount entitles him to the privilege of driving upon the track at all times, except Sundays and wet and muddy weather, unless the amount so subscribed is received back.

“ELMON HOWE.”

The track was located and used by the public in the summer of 1867 and down to 1872 and 1873, when the defendant planted trees across the track and ploughed up a portion of it, at the same time constructing a track upon another portion of his farm.

In 1874 plaintiff demanded the return of his money, and upon defendant's refusal to pay brought this action to recover the same.

*Samuel H. Grant* and *James A. Lynes*, for the appellant.

*Lamont & Baker*, for the respondent.

LEARNED, P. J.:

It is insisted by the defendant that all the subscribers should have joined and should have brought an action in equity. But we see no reason for this. The claim of each was distinct against the defendant and there were no joint rights. By the receipt which the defendant gave, he agreed that the plaintiff should have a

right to use the track. This language referred to the track then about to be constructed. When its situation was once fixed and it had been constructed, the defendant could not destroy it and prevent its use, even though he constructed another track somewhere else, without incurring a liability to the plaintiff.

It may be said that his liability was to be measured, not by the money paid by the plaintiff, but by the actual damages sustained by him through the disuse of the track. But we must notice that, in the subscription paper, there is an agreement that the money paid by the plaintiff shall be refunded to him, whenever the net receipts of the track are sufficient for that purpose. The defendant, by destroying the track, has prevented himself from receiving any thing for its use. He has therefore, by his own act, taken away the possibility for which the plaintiff contracted ; that of obtaining a return of his money from the net receipts. It cannot now be ascertained whether those receipts might not hereafter be sufficient to repay the plaintiff. It does not then rest with the defendant to say that his acts have not injured the plaintiff to the extent of the money paid. And we may notice also that the defendant reserved a privilege of repaying this money and therefore cutting off the plaintiff's rights to the track.

The judgment should be affirmed, with costs.

Present — LEARNED, P. J., BOCKES and OSBORN, JJ.

Judgment affirmed, with costs.

THE TROY AND BOSTON RAILROAD COMPANY,  
RESPONDENT, v. THE BOSTON, HOOSAC TUNNEL AND  
WESTERN RAILROAD COMPANY AND WILLIAM L.  
BURT, APPELLANTS.

*Temporary injunction — when refused.*

Some seventeen years since, the plaintiff, by a contract, became possessed of the rights and interests of the Albany and Vermont Railroad Company in its road-bed, which ran generally in the same direction, but at places two or three miles distant from plaintiff's road. At that time the plaintiff took up the tracks from a considerable portion of this route and ceased to use it, the road-bed being in most cases enclosed and used by the adjoining owners. Recently the defendant having acquired the rights and titles of some of the adjacent owners in and to the said road, entered upon the same and commenced to grade and lay tracks thereon, intending to operate the road when completed.

This action was brought by the plaintiff to restrain the defendant from so doing.

*Held*, that it was not a proper case in which to grant a temporary injunction.

APPEAL from an order granting an injunction restraining the defendant from building upon or operating as a railroad, or from in any manner interfering with the former road, built by the Albany Northern Railroad, lying between the Hudson river and Eagle Bridge, in the county of Rensselaer. The plaintiff claimed title to the premises in question through a contract or lease made by it with the Albany and Vermont Railroad Company some seventeen years before the commencement of this action.

*James Gibson*, for the appellants.

*Esek Cowen*, for the respondent.

LEARNED, P. J.:

In the view which we take of this appeal it is not necessary to inquire very carefully what may be the rights of the respective parties on a final decision upon the merits.

This appeal is brought from an order granting an injunction pending the action. Such an injunction is not a matter of right, but of discretion, and should be granted with great caution. It by

no means follows that, because it appears probable that the plaintiff will finally recover, therefore the court should restrain the defendant before the trial and decision of the case. The frequent granting of injunctions pending the action is the cause which has thrown so much discredit on this remedy.

In this present case the plaintiff claims, by virtue of a lease or contract, to own the road-bed and generally the rights which formerly belonged to the Albany and Vermont Railroad Company. The plaintiff became possessed of these rights about seventeen years ago. At that time it removed the rails from the road-bed for a considerable part of the route owned by the Albany and Vermont Railroad Company. That portion of the road the plaintiff has not in any way used from that time to the present. The owners of land along the road have generally inclosed the parts adjoining to their own property, as if the use had been abandoned for railroad purposes. This strip of land or road-bed is not generally adjacent to the road of the plaintiff. It lies, as stated on the argument, in places two or three miles distant therefrom. The plaintiff does not aver in the complaint that it is in possession of this apparently abandoned road-bed. But it alleges its intention at some future time if business requires to use this road-bed again.

After this long disuse of this piece of the road-bed and this actual resumption of it by the adjacent owners, the defendant has purchased from these owners, or some of them, their title thereto, whatever that may be, and is proceeding to construct a railroad thereon. It is the intention of the defendants to operate that road when completed. This will create a rivalry with the business of the plaintiff. The plaintiff has obtained an injunction forbidding the defendants from proceeding with this work, and the defendants appeal.

An injunction is sometimes granted to restrain trespassers, on the ground of preventing a multiplicity of suits. But as the plaintiff does not aver possession of the premises, it is not seen how trespass could be maintained, and this ground of the injunction seems insufficient.

So in some cases the owners of the property have, on a final decree, restrained the construction of a railroad in a street in front of their property. In such cases the owners have been in possession of the property, and the construction of the road has been held

to be an invasion of rights which they possessed, as well as claimed. In those cases, too, the land which the plaintiffs held had not been taken for railroad purposes, although it was subject to the easement of ordinary travel.

But in the present case the plaintiff, who has been out of actual possession of this land for seventeen years, seeks to restrain an entry upon the land, made under conveyances from those who were last in actual possession. To justify such an injunction, pending the action, it should appear that the acts done, and to be done, by the defendants will work such injury to the plaintiff as cannot be compensated, or that they will prevent the final judgment in the action from being effectual. Such does not seem to be the case here. If the defendants are re-grading and laying down rails, these acts do not permanently injure the land. If the land belongs to the plaintiff, the affixing of rails and sleepers thereto will tend rather to increase its value, by making it more fit for the purpose for which it was originally laid out and prepared. These acts will put the road in good condition for that very use of it, which the plaintiff avers that it contemplates at some future day.

It may be said that the defendants, after putting this road in order, will proceed to operate it and therefore should be enjoined; but there is no need even in that view of an injunction pending the action. The only damage to the plaintiff would be from loss of business. That could be compensated in damages; sufficiently so, at least, as to all that can be done before a trial and judgment.

The defendants evidently go on with this work at their peril, in case they have no right to the land. They are improving property to which it may appear that they have no title; while if they have a right to the land the injunction operates as a great injury to them; much greater than any possible loss which can be suffered by the plaintiff pending the action.

The railroad act provides for the right of a road to form connections with other roads. If then this road, when constructed, is a necessary link in the route of the defendants it would seem that they would have a right of connection over it; although it may be decided to belong to the plaintiff. The legislature did not intend that a railroad company owning a certain line of road should block up all passage over it by refusing to connect with other roads. It



is unreasonable that the plaintiff should neither use this road-bed itself nor permit others to use it. Certainly they should not do this by an injunction pending the action, when the final judgment can redress all injuries which they may be shown to have suffered if they should establish the rights they assert.

Without, therefore, making any decision on the merits of the case as they may appear on the trial, we think that this is not a case where during the action the defendants should be enjoined.

The order appealed from should be reversed, with ten dollars costs and printing disbursements.

Present — LEARNED, P. J., BOCKES and OSBORN, JJ.

Order reversed with ten dollars costs and printing disbursements, and motion for injunction denied, with ten dollars costs.

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CHARLES H. CLEARWATER, RESPONDENT, v. NICHOLAS  
H. DECKER, IMPEADED, ETC., APPELLANT.

*Discontinuance — when it should not be allowed.*

After the evidence in a case has been agreed upon and submitted to the justice trying the same, and a motion to open the case and take further evidence has been denied by him, a discontinuance of the action should not be allowed.

APPEAL from an order discontinuing this action on the application of the plaintiff. After this action had been commenced it was agreed to submit the same to the justice trying the case upon a statement of facts agreed upon by the parties. Subsequently an application was made by the plaintiff for leave to change and alter the form of the submission, which was denied.

Thereafter the plaintiff applied, upon notice, to another justice for leave to discontinue the action, which was granted. From this order this appeal is taken.

*Samuel G. Courtney*, for the appellant.

*Alfred C. Chapin*, for the respondent.

*Per Curiam :*

The evidence had been agreed upon by stipulation and had been submitted to the judge who was trying the case. A motion was subsequently made before him, which was, in effect, a motion to open the case and take further or other evidence. This motion he denied. All the evidence in the action therefore was before the judge. Nothing remained except the argument of counsel. Under these circumstances we think that the plaintiff should not have been allowed to discontinue. The case was in possession of the court for trial. To permit a discontinuance at that time was to permit the plaintiff to withdraw the case from one judge who had heard (or might have read) the evidence, and to bring on a new action before some tribunal thought to be more favorable.

We are referred by the plaintiff to the case of *Cummins v. Bennett* (8 Paige, 81). There had been no trial in the case; nor had a trial been commenced before the court.

We think the order should be reversed, with costs.

Present — LEARNED, P. J., BOCKES and OSBORN, JJ.

Order reversed with ten dollars costs and printing disbursements, and motion denied, with ten dollars costs.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
MATTHEW D. FREER, RESPONDENT, v. THE CANAL  
APPRAISERS, APPELLANTS.

*Canal Appraisers — refusal to make return to canal board — mandamus.*

Upon an appeal by a claimant to the canal board from a decision of the Canal Appraisers, the latter refused to make a return to the appellate tribunal, on the grounds, first, that the appeal was not taken in time; and, second, that the relator had settled his claim and given a release in full therefor.

*Held*, that both of these questions were to be considered and decided by the appellate tribunal and not by the Canal Appraisers, and that a *mandamus* should issue compelling the Appraisers to make the required return.

APPEAL from an order made at the Special Term, granting a writ of peremptory *mandamus* compelling the appellants to make a return

to the canal board in the matter of the respondent's appeal from a decision made by them.

*Parker & Countryman*, for the appellants.

*N. A. Halbert*, for the respondent.

LEARNED, P. J. :

The Canal Appraisers constitute a tribunal to decide on certain matters between the State and claimants. They passed upon a claim of the relator. He appealed from their decision to the canal board. On such appeal it is the duty of the appraisers to make a return to the canal board. They refuse to do this. Their reasons are two: First, that the appeal was not taken in time. Second, that the parties, that is, the people and the relator, have settled the claim.

Now it appears to us that these are questions properly to be decided by the appellate tribunal, viz., the canal board. It would be unreasonable if the inferior tribunal could deprive the superior tribunal of the right to review, by deciding that the appeal was not taken in time, or that the cause had been settled. For instance: an appeal lies from this court to the Court of Appeals; would it be proper for a clerk of this court to refuse to make a return, after a notice of appeal had been served, on the ground that it had not been served in time, or that the parties had settled? Clearly not. Those would be matters for the Court of Appeals to decide in that case. They would have to pass upon their jurisdiction of the case. And so in this case, it is not for the Canal Appraisers or their clerk to decide that the right of appeal is gone. That must be decided by the canal board.

But it will be said that it is for this court to decide these questions on this motion. We think not. The question is, what ought the canal appraisers to have done? If they ought to have made the return for the reason that it did not lie with them to decide the questions above mentioned, then we have nothing to do with those questions on this motion. We ought not on this motion to pass on questions which are to be decided by the canal board. Whether or not those questions may eventually come to us, after a decision by

the canal board, we need not now inquire. The question now is, what, under the facts before them, was the duty of the Canal Appraisers? They certainly had not the right to pass on the fact of the alleged settlement. It is true that a *mandamus* could not issue in a doubtful case. But what is in doubt here? Not the question whether the appeal is in time, nor whether the parties have settled. Those are matters with which we have nothing to do, because the canal appraisers had nothing to do with them. The only question is whether, when a notice of appeal had been served on the inferior tribunal, it ought to send the papers to the appellate tribunal, or ought itself to decide whether the appeal is well taken, and if it should decide in the negative ought to deprive the appellate tribunal of the opportunity of passing on the question.

Of course there might possibly be cases where the appeal was so utterly improper, or so clearly barred, that in an exercise of discretion we might refuse a *mandamus*, leaving the party to his common law action. But we do not think that this is such a case. If an issue were raised and tried in this proceeding, as we think, the question would be, not whether the appeal was too late, or whether the claim was settled, but whether the canal appraisers were authorized to try those facts and to refuse a return if they found the facts against the relator.

We do not see that any harm can be done if the Canal Appraisers make the return. The canal board, if they think that the appeal is taken too late, or that the claim is barred by settlement, can so decide. Whatever right of review of their decision is given by law, directly or indirectly, can then be had.

We think the order should be affirmed, with ten dollars costs and disbursements.

BOOKES, J. :

I agree with my brother OSBORN, that on the papers before us it is made to appear very clearly that the relator accepted the award made by the canal appraisers in full satisfaction of his claim; and that he should be held to such acceptance as a finality. But, I think, with Mr. Justice LEARNED, that this question was not for the appraisers, and is not for us now on this appeal, but rests with the appellate tribunal to determine. It will not do for an inferior

court or tribunal to undertake to decide upon the validity of an appeal taken from its judgment, by refusing to make return. The question of the regularity and validity of an appeal in a case where an appeal is authorized by law must, in reason and propriety, be determined by the appellate tribunal.

I must concur with Mr. Justice LEARNED, that it does not lie with the Appraisers to say that the appeal was not brought in time, or that the relator had settled and accepted satisfaction of the subject-matter of this controversy, and therefore refuse to make return. Those questions are as I think for the appellate tribunal, when the record shall have been certified to it, by a return to the appeal.

OSBORN, J.:

I regret that I cannot concur with my older and more experienced brethren in the disposition that should be made of this case. I cannot escape the conviction that the court at Special Term erred in awarding a peremptory *mandamus* to the relator.

Aside from the point raised, that the appeal from the award of the Canal Appraisers to the canal board was not taken in time, which seems to be in some doubt, the papers show quite clearly, if not conclusively, that the relator accepted the amount found due him in full satisfaction of any and all demands against the State. The receipts he gave purported to be receipts in full, and the fact appears that he was notified that a certificate could not be awarded or payment made, unless he (relator) accepted the same in full of his demand. This was one of the regulations of the State, and a very proper one too, that if the claimant received the amount awarded him he must give a receipt and release in full of all demands on which and for which the award to him was made. The number of claimants is of course very large. The amount demanded is also very large, and it could hardly be expected that in the majority of instances the claimants will be satisfied with the amount awarded them. If in such cases they may be permitted to receive the amount awarded, give receipts in full, and then bring and prosecute appeals in hope of obtaining greater amounts, the State is surely placed at a disadvantage that can only work injustice.

In this case it is true the relator denies that he agreed in terms to accept the award in full, but the preponderance of evidence is that he did, and he did give receipts purporting to be in full of all his claims and demands.

Under such circumstances I do not think a peremptory mandamus should issue. To entitle a party to such a writ the facts upon which the same is asked must be reasonably clear and free from doubt.

For the reasons already given the order at Special Term should be reversed, with ten dollars costs and printing disbursements, but without prejudice to the rights of the relator to apply again to the Special Term for an alternative *mandamus*, if he shall be so advised.

Order affirmed, with costs.

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ALEXANDER McMILLEN, RESPONDENT, v. TIMOTHY C. CRONIN, EXECUTOR, ETC., OF HOLLIS BRUCE, DECEASED, APPELLANT.

*Right of way — right of the owner of the easement to repair the way.*

Where one has a right of way over the lands of another, he may do whatever is suitable and proper to put the said way in good order, provided it be done without unnecessary inconvenience to the owner of the fee.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

The action was brought to recover damages for an assault and battery. The defense interposed was that the plaintiff was trespassing upon defendant's ground and refused to leave the premises.

The *locus in quo* had been used as a private way from plaintiff's premises, over defendant's land, to the public highway, for more than sixty years, a gate having always been maintained near the highway and also at plaintiff's line. It was claimed by defendant that plaintiff had removed his gate and thereby forfeited the right to use the way. At the time of the assault the plaintiff was engaged in repairing the way.

*M. Fairchild*, for the appellant. In this case the right of private way claimed by the plaintiff being established only by user, is governed entirely by the user; and as the way had never been worked, the plaintiff had no right to work it, and was wrongfully there for that purpose, plowing, turnpiking, ditching, etc. (Washb. on Easements, 20.) The extent of the right acquired by twenty years' user is conclusively governed by the user. (*Corning v. Gould*, 16 Wend., 531, and cases cited in the opinion of COWEN, J.; 3 Kent, 420, note *d*, in 7th ed; *id.*, 424, note 1, in 7th ed.) The owner of a right of private way, by prescription, has no right to cut ditches to repair. (*Capers v. McKee*, 1 Strob., 164; Washb. on Easements, 72.) Where a way is claimed by prescription the character and extent of it is fixed and determined by the user under which it is gained. The extent of a usage of a way is evidence only of a right commensurable with the use. (Washb. on Easements, 72.)

*S. W. Russell*, for the respondent.

LEARNED, P. J. :

The defendant insists that as the plaintiff had removed certain gates, which had been at the ends of the way used over the defendant's land, he had thereby lost the right of way. We see no connection between that act and his right of way. The plaintiff was not engaged in such removal, when the assault was committed.

The defendant also insists that, as it did not appear that the way had ever been repaired, the plaintiff had no right to repair it. It was not shown affirmatively that no repairs had ever been made. But further it was established that the plaintiff had a right of way over the defendant's land. This was proved by the use thereof for sixty years and the right was not denied. It would seem strange, if the plaintiff had such a right of way, that he might not put it into such condition as to be conveniently passable. If not, it might cease to be a way, by becoming utterly impassable.

If a right of way is given in a place where one cannot go without doing some work, it is lawful to make the way by digging and laying a foundation. (Dig. 8, 1, 10.) This rule of the civil law is one of its "luminous principles" on the subject of servitudes. We see no reason why it should not be the law now. There is no evi-

dence in this case that the plaintiff was doing any thing that was not suitable and proper to put the way in good order, without unnecessary inconvenience to the owner of the fee.

In the case of *Capers v. McKee* (1 Strob., 164), cited by the defendant, the person entitled to the right of way was constructing a ditch at the side of the way, and such construction does not appear to have been necessary to the use of the way, although it may have been desirable. It would seem also to have been an inconvenience to the owner of the land. That case is not like the present.

The judgment should be affirmed, with costs.

Present — LEARNED, P. J., BOOKES and OSBORN, JJ.

Judgment affirmed, with costs.

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WILLIAM B. THORPE, RESPONDENT, v. THE NEW YORK  
CENTRAL AND HUDSON RIVER RAILROAD COM-  
PANY, APPELLANT.

*Drawing-room cars — liability of railroad company drawing cars under contract with  
car company.*

The defendant entered into a contract with Webster Wagner, by which Wagner agreed to place upon defendant's road certain drawing-room cars at his own cost and keep the interiors thereof in good order, Wagner's conductors and porters thereon to be carried free of charge by the railroad company. The defendant's conductors had a right to enter the cars for any purpose connected with the management of the train, and for the collection of fares, and to the assistance of Wagner's conductors and porters in enforcing good order; but not otherwise to interfere with the business of such cars. In consideration of the railroad company hauling and making certain repairs to the cars, Wagner agreed to pay it twenty per cent of the gross receipts.

In an action brought by the plaintiff against this defendant the railroad company, to recover for injuries sustained by reason of his alleged wrongful removal from the drawing-room car by the porter thereof, *held*, that the defendant was liable for any injuries so sustained by him.

APPEAL from a judgment entered on a verdict in favor of the plaintiff at the Cayuga Circuit.



The plaintiff, on July 20, 1874, entered defendant's train at Syracuse. To the train was attached in addition to the ordinary cars a Wagner drawing-room car, which latter was run upon defendant's road under the provisions of the contract hereinafter set forth. The drawing-room car was in charge of a porter employed by Wagner. The train was in charge of defendant's conductor. The plaintiff passed through the ordinary cars, and finding no seats, entered the drawing-room car, having paid to defendant's conductor the regular fare to Auburn. The porter of the drawing-room car demanded additional fare for riding in that car, which plaintiff declined to pay, at the same time refusing to leave the car, on the ground that there were no seats vacant in the other cars, but saying he would do so when there were seats to be had. The porter thereupon removed the plaintiff from the drawing-room car while the train was in motion. The evidence as to excessive force having been used and as to there having been vacant seats in the other cars was conflicting. The jury found for the plaintiff. A motion was subsequently made at Special Term for a new trial and was denied.

The following is the contract under which the Wagner cars were run upon the defendant's road :

"Agreement made the first day of January, one thousand eight hundred and sixty-nine, between the New York Central Railroad Company, of the first part, and Webster Wagner, of the second part :

"For the purpose of the establishment and maintenance of a line of compartment or drawing-room cars upon the New York Central Railroad, and to secure to the public the advantages thereof and of all existing improvements in connection with the business of compartment or drawing-room cars, it has been agreed as follows, viz. :

"1st. The said Wagner shall, at his own cost, place upon the said railroad as many compartment or drawing-room cars as the business of the company shall from time to time require, and shall, at his own cost, keep in thorough repair the furniture of the cars, and maintain the interior of said cars at all times in good and cleanly order. He shall also keep the exterior of the cars properly painted and varnished, the railroad company furnishing shop room and doing the painting and varnishing at cost. All other repairs are to be done by the railroad company at their expense, but in case

any car shall be so deteriorated or damaged by age, derailment, collision or fire as to be unworthy of repair the railroad company shall not be obligated to repair the same.

"The number of cars requisite for the accommodation of the traffic shall be determined by the superintendent of the railroad company, who shall also have at all times the power to decide whether any of such compartment or drawing-room cars shall be in other than good running order, and who shall also determine the location of such compartment or drawing-room cars in the trains.

"The conductors and porters in charge of the compartment or drawing-room cars shall be carried without charge; the railroad company not to be liable for injuries to the persons of such conductors and porters, the said Wagner undertaking to indemnify and save harmless the said railroad company from all liability to the employes of the compartment or drawing-room cars when in charge thereof or when traveling on any part of the road on the business appertaining to the compartment or drawing-room cars. The conductors of the railroad trains shall have the right at all times to enter such compartment or drawing-room cars for the purpose of collecting the fares of the passengers, or for any purpose connected with the management of the train, and the conductors and porters of the compartment and drawing-room cars shall at all times assist the conductors of the railroad trains in enforcing the good order and discipline of the road. The conductor of the train shall not be at liberty to interfere in any way with the matter of the distribution of compartment or drawing rooms, and shall not interfere in any manner with the business of the compartment or drawing-room cars except for the purpose of collecting the fares or tickets of the passengers, and in aid of the good order and discipline of the road. The said Wagner shall give his personal attention to the management of the business, and in case of his death his personal representatives or the owners of the compartment or drawing-room cars shall at their own expense employ some suitable person, acceptable to the railroad company, to take the general charge of the said compartment or drawing-room cars and the business thereof.

"The said Wagner is to indemnify and save harmless the said railroad company from any liability to patentees of alleged inventions in respect of compartment or drawing-room cars, and is at his

own expense to procure the requisite licenses for any such inventions which may be used in said compartment or drawing-room cars. The said Wagner shall not assign this contract without the consent of the company.

"2d. In consideration of the service performed by the New York Central Railroad Company in hauling said compartment or drawing-room cars, in cleaning the exterior thereof, in the furnishing of fuel and light therefor, and of their undertaking, in respect of the repairs to the trucks and brakes and the exterior of said cars, the said Wagner agrees to pay to the New York Central Railroad Company each and every month twenty per cent of the gross receipts and earnings derived by him from the business (first deducting from the sum of such gross receipts the amount paid by the said Wagner as the patent or license fee for the patented inventions used in such compartment or drawing-room cars). Said Wagner is to keep books of account of such receipts and earnings, and exhibit the same and all vouchers appertaining thereto to the treasurer of the New York Central Railroad Company whenever required by said treasurer.

"The said payment of the twenty per cent of the gross receipts and earnings is to be made to the treasurer of the New York Central Railroad Company on or before the tenth day of each month.

"3d. This agreement shall continue for the term of ten years from the first day of January, 1869, and during the continuance thereof no other party than the said Wagner or his assigns shall be allowed to run compartment or drawing-room cars on said railroad; but this provision is not to prohibit the said company from permitting the compartment or drawing-room cars of other railroads to run thereon from Buffalo and Suspension Bridge to Rochester, as they are now run, upon such terms as may be agreed upon between said New York Central Railroad Company and such other railroads.

"THE N. Y. CENTRAL RAILROAD CO.

"D. TORRANCE, V. P.

"W. WAGNER."

{ 20 cents  
U. S. Rev. stamp. }

*Harris & Cook*, for the appellant.

*Rollin Tracy*, for the respondent.

BOARDMAN, J. :

It was submitted to the jury to find, (1) whether the cars were in such rapid motion as to render it unsafe and imprudent for the porter of the Wagner car to remove the plaintiff from that car to another in the rear ; (2) whether, for this reason, the plaintiff was justified in refusing to pass back into the other car ; (3) whether, if the porter was right in forcibly removing the plaintiff from the Wagner car, he did not use more force than was necessary for that purpose. To have given the plaintiff a verdict the jury must have found, either that it was unsafe to pass from one car to another while the cars were in motion, or that the porter used excessive force. In either event the cause of action against some one was established. It was also submitted to the jury to find whether the plaintiff was a trespasser or wrongfully in the Wagner car. That fact may have been of importance in getting at the amount of damages, but I think it was not material in respect to the right of recovery. Even if plaintiff had been a trespasser in the Wagner car the porter could not remove him from the car in a dangerous and unsafe manner or use excessive force. (*Rounds v. Del., Lack. and W. R. R. Co.*, 64 N. Y., 129.)

The jury has determined that the removal of plaintiff from the Wagner car at the time and under the circumstances and in the manner was wrongful. A cause of action is found to exist in favor of the plaintiff. Is it against the defendant? If the porter had been defendant's servant no reasonable doubt could exist as to its liability under the facts proved. (*Rounds v. D., L. and W.*, ante ; *Cosgrove v. Ogden*, 49 N. Y., 255 ; *Jackson v. Second Avenue R. R. Co.*, 47 id., 274.) It may well be that Wagner is liable ; of that we need not now consider.

The legislature of this State has given to the defendant certain franchises. It cannot divest itself of its responsibility under the laws for the proper exercise of its duties. The arrangement between the defendant and Wagner was private and personal. When Wagner's car was put into the train it became a part of defendant's train, was under the control of its conductor, was in his care and custody. The defendant and not Wagner ran the train. In effect Wagner, by his agreement, supplied the defendant with certain cars to be used for the joint interest of Wagner and

defendant. The Wagner cars were run for joint account. Why, then, are not Wagner's servants in these drawing-room cars also the servants of defendant? Why shall not the defendant be held responsible for the wrongful act of Wagner or his agents while upon its road and under its control? The Illinois Central Railroad was held liable for an injury to one of its own passengers on its own road, caused by the fault of a train of the Michigan Central Railroad running on the same road by the owner's permission. (*Railroad Co. v. Barron*, 5 Wall. [U. S.], 90, 104, and authorities cited.) Drawing-room cars, under a contract like that in evidence in this case, were seized for taxes against the company owning the road but not the cars. (*Kennedy v. St. Louis, etc., R. Co.*, 62 Ill., 395; 7 Am. Railway Cases, 346.) The owner of a road was held responsible for the use of a patented improvement on cars run on its road, though another road held all its stock, provided the cars and worked the road under a special contract. (*York, etc., R. R. Co. v. Winans*, 17 How. [U. S.], 30, especially top of page 40; see, also, *Railroad Co. v. Brown*, 17 Wall. [U. S.], 445, 450, 451; 1 Redf. Law of Railways, chap. 22, § 1, p. 598; *Macon and Augusta R. R. Co. v. Mayes*, 49 Georgia, 355.)

From the authorities cited we are led to the conclusion that the defendant was liable for the acts of the porter of the Wagner car, to the same extent as if he had been hired by, and was in the immediate employment of, the defendant.

The learned justice charged the jury, in substance, that plaintiff was bound to occupy a vacant seat in the common car, if there was one, but if there was none he had the right to enter the drawing-room car. To the latter part of this proposition the defendant excepted.

The correctness of this charge is only of importance upon the amount of damages, and the same is true of the refusal to charge to be hereafter noticed. Perhaps even in that respect it may not be material whether the plaintiff was rightfully in the Wagner car or not. He was on defendant's train. He was entitled to a seat. He takes the first he finds, as the jury, by its verdict, says. When requested to pay the extra twenty-five cents he notified the porter that there were no vacant seats in the other cars, and that he would go in there as soon as he could get a seat. I think the

charge, under the facts, was correct. If so it was also correct to refuse to charge that it was the plaintiff's duty to ask the conductor for a seat before passing into the drawing-room car. The fact is evident that there were not seats enough in the ordinary cars for the passengers therein, and that the conductor could not give seats to all. The jury, by its verdict, has so found. There is evidence to sustain such finding. This appeal is from the judgment alone. Every fact found by the jury against the defendant is conclusive. The defendant's proposition, then, is that the plaintiff should have asked the conductor for a seat when there was none to his knowledge vacant, and that a failure to do this made plaintiff a trespasser in going into the Wagner car. I think he was wrongfully there only when he refused, upon demand, to pay the extra fare, and unreasonably declined to leave the car.

These are all the questions presented for consideration, and the reasons above given lead to an affirmance of the judgment, with costs.

LEARNED, P. J., concurred.

SAWYER, J. (dissenting):

I do not think the porter on the Wagner car was defendant's servant; nor that the contract establishes it any more than a percentage to a salesman by way of salary makes him a partner.

Judgment affirmed, with costs.

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GEORGE W. RING, RESPONDENT, v. THE CITY OF COHOES,  
APPELLANT.

*Municipal corporation — liability of, for accident caused by obstruction in highways — for injury occasioned by accident.*

The defendant placed on the west side of Mohawk street, in the city of Cohoes, a hydrant, projecting several inches beyond the curb, with an iron nozzle on the side nearest the street, which projected several inches over the road-bed, at the height of about two feet. On the opposite side of the street the defend-

ant had negligently allowed to accumulate a pile of ashes twenty feet long, ten feet wide and three feet high, the space between the pile and the west curb being about twenty feet.

Plaintiff's horse, which he was driving before a sleigh, took fright and ran along the street in the direction of the hydrant; plaintiff was unable to guide or direct him with precision; at that time a wagon was passing the hydrant in an opposite direction, leaving a space of about twelve feet between it and the hydrant; plaintiff's horse, in passing through this space, struck the hydrant or its nozzle, with the cross-bar of the sleigh, whereby the plaintiff was thrown therefrom and injured. Plaintiff used his best endeavors to guide and control his horse, which was blind, and was guilty of no negligence which contributed to the accident.

This action was brought to recover damages for the injuries sustained.

*Held*, that the facts of the case justified a finding by the referee that the defendant was negligent in allowing the pile of ashes to accumulate and remain in the street, and in erecting and maintaining the hydrant so that it and its nozzle projected into the street, and that the plaintiff was entitled to recover.

That the fact that the plaintiff's horse was blind, and that the accident occurred while it was running away, did not relieve the defendant from the liability imposed by its negligence, so long as it appeared that the plaintiff was blameless and free from any negligence contributing to the accident.

In making improvements in the public streets, and in keeping them in repair, the officers of the municipality are bound to act with due regard to the safety of travelers; and for any neglect or omission of duty in that regard, an action will lie by any person specially injured thereby.

It is the duty of a municipality, bound to construct and maintain highways, to provide for the reasonable safety of travelers in reference to such accidents as may be expected to happen therein; and when a traveler is not in fault, but an injury happens to him, which is the combined result of accident, and of negligence attributable to the municipality because of its omission to keep the road in repair, the latter will be held liable for the damages occasioned thereby.

**APPEAL** from a judgment in favor of the plaintiff, entered upon the report of a referee.

This action was brought to recover damages for personal injuries sustained by the plaintiff while driving a horse and cutter upon Mohawk street, in the city of Cohoes. The referee found, among other things: "That Mohawk street was a public highway and street within said city; that at the time of the accident and injury to the plaintiff, hereinafter mentioned, a large pile of ashes and cinders had accumulated upon the westerly side of said Mohawk street, at a point directly opposite the place where said injury occurred, and within the portion of said highway usually traveled

by horses, vehicles, etc.; that said pile of ashes was about twenty feet in length along the length of said street, about three feet high and about ten feet wide, and extended easterly from a point about one foot easterly of the west curb of said street towards the middle of said street to a point about eleven feet easterly from said westerly curb; that said pile of ashes and cinders had been accumulating for some weeks prior to the time of such accident and injury; that the accumulation and existence of said pile of ashes and cinders was well known to the street commissioner of the defendant, whose duty it was to remove the same; that said street commissioner and the defendant negligently allowed said pile of ashes and cinders to remain in said street, and that the same were so placed in said street with the knowledge and consent of said street commissioner and for the use of the defendant; that at the point where said accident and injury occurred, the portion of Mohawk street traveled by teams was thirty feet in width between the curbs; that directly opposite said pile of ashes and cinders; at the time said accident and injury occurred, and partly in the line of the west sidewalk and partly without and extending into the space between the curbs several inches, stood a hydrant, which had there been placed and maintained by the defendant; that upon the side of said hydrant, next the portion of said street traveled by teams, etc., was an iron nozzle which projected several inches over the space between the curbs; that said nozzle was about two feet above the surface of the ground; that on the 6th day of February, 1872, in the daytime, the plaintiff was driving on Mohawk street, at its intersection with Remsen street, about eighty feet distant from said hydrant, with a horse attached to a sleigh in which said plaintiff was seated; that said horse suddenly took fright and started upon a run along Mohawk street in the direction of said hydrant; that said plaintiff was unable to restrain said horse from running, and was unable to guide or direct him with any precision, although he used his best endeavors so to do; that said plaintiff was able to and did, to a certain slight extent, guide and control said horse in the direction in which he moved; that at that time, a wagon loaded with wood, and before which was a team of horses, was coming along Mohawk street from a direction opposite to that in which said plaintiff was moving, and had arrived at a point opposite said pile of ashes and between



the same and said hydrant, and was moving along the side of said pile of ashes, which lay towards the middle of the street; that said wagon was between five and six feet in width; that the space between said wagon and hydrant was about twelve feet wide, and that in passing up said Mohawk street, in the direction in which he was going, the plaintiff, with his horse and sleigh, was compelled to pass between said wagon and said hydrant; that there was sufficient space between said wagon and said hydrant for said plaintiff and his horse and sleigh to have passed in safety, had said plaintiff had complete control of his horse; that within five seconds from the time said plaintiff's horse commenced to run, he reached the space between said hydrant and said wagon and attempted to pass through the same; that in attempting to do so he ran so near to said hydrant that the cross-bar of the sleigh, in which plaintiff was riding, struck against the nozzle of said hydrant, or the portion of said hydrant which projected beyond the curbstone, whereby said sleigh was suddenly stopped and the plaintiff thrown with great force and violence against said hydrant, whereby his nose was broken, his cheek was cut and laid open, and he otherwise greatly injured; that, by reason of such injuries, said plaintiff became sick and disabled for several weeks, and has been permanently disfigured; that said horse so driven by the plaintiff was blind; that the plaintiff used his best endeavors to guide and control the horse he was so driving, and was guilty of no negligence which contributed to the accident or injury hereinbefore described; that the defendant was guilty of negligence in allowing and permitting said pile of ashes and cinders to accumulate and remain in said street, and in erecting and maintaining said hydrant so that the same and the nozzle thereof projected into the portion of the street between the two curbs, and that such negligence, on the part of the defendant, contributed to the accident and injury to the plaintiff above described; and as conclusion of law, that, by reason of the matters aforesaid, the plaintiff was entitled to recover of the defendant the sum of fifteen hundred dollars (\$1,500)."

*Samuel Hand*, for the appellant. The so-called negligent acts of the defendant, alleged by the plaintiff and found by the referee, were too remotely connected, if at all, with the accident to have

caused or contributed to it in a legal sense. The proximate and legal cause of the accident was the blindness of the plaintiff's horse, his unmanageability and his running away. (*Marble v. City of Worcester*, 4 Gray, 395; *Hudson R. R. Co. v. Mott*, 1 Robt., 585; *Shearman & Red.* on Negligence, 39; *Wilson v. Susquehanna Turnpike Co.*, 21 Barb., 68; *Austin v. New Jersey Steamboat Co.*, 47 N. Y., 75; *Lunven v. Gas-light Co.*, 44 id., 459.) The pattern of the hydrant, or its projection a few inches, cannot be held legal negligence at all. There was no testimony whatever that this was not the usual, ordinary and proper method of placing them. (*Dongan v. Champlain Co.*, 56 N. Y., 1.) But again, the shape, pattern, form and location of water hydrants were matters within the discretion of the water commissioners. No action lies for the exercise of that discretion, although bad judgment was shown. (*City of Lansing v. Toolan*, Alb. Law Journal, Sept. 8th, '77, p. 164; *Kavanagh v. Brooklyn*, 38 Barb., 232; *Mills v. Brooklyn*, 32 N. Y., 489; *Wilson v. Mayor*, 1 Den., 595; *Cole v. Medina*, 27 Barb., 218.)

*Charles F. Doyle* and *Nathaniel C. Moak*, for the respondent. The city having permitted one-half of its street to be filled with ashes, and built a hydrant with its nozzle into the street on the opposite side, thereby rendered itself liable to one injured in consequence of the defective condition of the street. (*Chicago v. Brophy*, 2 Law and Eq. Rep., 224.) The plaintiff was entitled to recover, notwithstanding he was, for some few seconds after his horse started, unable to obtain entire control of him. Had there been no nozzle of the hydrant projecting into the street, he would as it was have passed the ordeal without injury. (*Baldwin v. The Greenwood Turnpike Company*, 38 Conn., 238; 13 Am. Law Reg. [N. S.], 423; *Hunt v. Pownal*, 9 Vt., 411; *Lower Macungie Township v. Merkhoffer*, 71 Penn. St., 276; *Hey v. The City of Philadelphia*, 2 Weekly Notes of Cases, 465; *Newlin Township v. Davis*, 1 Weekly Notes, 211; *Pittsburgh v. Grier*, 10 Harris, 54; *Scott v. Hunter*, 10 Wright, 194; *Sherwood v. The City of Hamilton*, 37 Upper Can. [Q. B.], 410.) In the State of Maine, under a statute not unlike ours, it has been in several cases held that the corporation is not liable if there be two efficient, independent proximate causes of an injury sustained by a traveler upon a highway,

the primary cause being one for which the corporation is not liable, and as to which the traveler himself is in no fault, and the other being a defect in the highway. (*Moore v. Inhabitants of Abbott*, 32 Maine, 46; *Farrer v. Inhabitants of Greene*, id., 574; *Coombs v. Inhabitants of Topsham*, 38 id., 204; *Anderson v. City of Bath*, 42 id., 346; *Moulton v. Inhabitants of Sandford*, 57 id., 127.) In the State of New Hampshire, under a statute also like ours, the contrary is held. It is there held that where two causes combined to produce the injury, both of which were in their nature proximate, the one being the defect in the highway, and the other some occurrence for which neither party is responsible, that the corporation is liable, provided the injury would not have been sustained but for the defect in the highway. (*Winship v. Enfield*, 42 N. H., 197; *Clark v. Barrington*, 41 id., 44; *Tucker v. Hunniker*, id., 317; *Norris v. Litchfield*, 35 id., 271.) In the State of Vermont, under a similar statute, the courts appear to be in unison with the courts of the State of New Hampshire on this question. (*Hunt v. Town of Poumal*, 9 Verm., 411; *Kelsey v. Town of Glover*, 15 id., 708; *Allen v. Town of Hancock*, 16 id., 230.) In the State of Massachusetts, under a similar statute, the decisions are apparently conflicting. In *Palmer v. Inhabitants of Andover* (2 Cush., 600), it was held that the corporation is liable for an injury occasioned by a defect in a highway where the primary cause of the injury is pure accident. But subsequent decisions have shaken it. (*Murdock v. Inhabitants of Warwick*, 4 Gray, 178; *Marble v. City of Worcester*, 4 id., 395.) And still later it has been approved. (*Rowell v. City of Lowell*, 7 Gray, 100.) The result of the Massachusetts decisions would appear to be to hold that, if at the time the accident happened, the horses were, and for some considerable time had been, out of the control of the driver, the corporation is not liable. (*Davis v. Inhabitants of Dudley*, 4 Allen, 557; *Titus v. Inhabitants of Northbridge*, 97 Mass., 258; *Horton v. Taunton*, 97 id., 266, note; *Fogg v. Nahant*, 98 id., 678; reported, also, in Withrow's American Cases, 464.) In the State of Wisconsin, where a similar statute exists, the principle of the last mentioned cases appears also to prevail. (*Dreher v. Fitchburg*, 22 Wis., 675; *Houfe v. Town of Fulton*, 29 id., 296; S. C., 9 Am. Rep., 568.)

BOOKES, J. :

The right of action rests upon the alleged improper manner of setting the hydrants as to locality. The street opposite the hydrant was obstructed by a pile of ashes which had been accumulating for a considerable period of time ; but this fact was of importance only as the ash-pile narrowed the surface of the street, open to travel at the place where the injury occurred ; and hence, to some extent, bore on the question whether the road, in view of the manner in which the hydrant was placed, was, at that, point, reasonably safe for public travel.

The plaintiff was driving along the street, seated in a sleigh, when the horse took fright, became unmanageable, so that the plaintiff was unable to restrain or guide it with any precision. The horse ran, at a slight angle with the street, toward the hydrant ; in passing which the cross-bar of the sleigh, attached to and connecting the thills, struck it, or its nozzle, and the plaintiff was thrown from the vehicle and seriously injured. The hydrant stood partly within and partly without the line of the curbstone, with its nozzle further projecting several inches into the roadway. The referee found that the defendant was guilty of negligence in erecting and maintaining the hydrant in such locality and position, and that such negligence contributed to the injury complained of ; and further, that the plaintiff was free from fault in all respects. As regards the form of the hydrant, and as to its position in the street, there is no controversy on the facts ; and the referee finds, upon sufficient evidence to sustain the findings, that the cross-bar of the sleigh struck against the nozzle of the hydrant, or against that portion of the hydrant which projected beyond the curbstone into the roadway of the street. The street in the vicinity of the hydrant, and its narrowed condition by reason of the ash-pile, were described by the witnesses with particularity ; as were also the pattern of the hydrant and its location with reference to the curbstone, and its proximity to the ash-heap. As to the general facts of the case there seems to be no dispute of any moment. The question then was, and this question, it seems, still remains for us to consider even although it should rest on conflicting evidence (*Godfrey v. Moser*, 66 N. Y., 250), whether the roadway was reasonably safe for travel in its surface, margin and muniments ? (*Glidden v. Town of*

*Reading*, 38 Vt., 52.) And this must be so when the particular highway and its alleged obstructions or imperfections are given in evidence from which negligence may or may not be deduced. The obstruction here complained of was at the extreme margin of the road-bed; and this fact was and is an important one to be considered, in determining whether the street was reasonably safe for public travel. But it must be held in mind that the defendant, having the right to control the entire width of the street, and to keep it free from obstruction from curbstone to curbstone, had a corresponding duty in that regard. (*Morse v. Richmond*, 41 Vt., 435.) The duty also in a city would be commensurate with the increased density of travel. (*Fitz v. City of Boston*, 4 Cush., 365; *Bryant v. Inhabitants of Biddeford*, 39 Maine, 193.) Undoubtedly in this case there was a fair question, for the trial court on the evidence submitted, whether the defendant was or was not negligent in regard to the matter of complaint. In *Clemence v. City of Auburn* (11 N. Y. S. C. [4 Hun], 386), the obstruction or imperfection in the street (a slight deflection in the sidewalk) seems almost insignificant as a ground of negligence, yet the court held a nonsuit improper and set it aside. This decision was affirmed in the Court of Appeals. (66 N. Y., 334.) It cannot, as we think, be held in this case that the defendant was absolutely free from negligence and consequent liability; nor that the findings of the referee to the contrary of this were without sufficient support on the evidence. As to the question of contributory negligence on the part of the plaintiff, there is an absence of all proof showing that he was in fault; and the conclusion of the referee that he was free from fault is well found. It is urged that there is no proof that the location of the hydrant in the street, partly within the line of the curbstone, with its nozzle further projecting over the road-bed, was unusual or out of the ordinary mode of setting them; nor that any like injury had ever before occurred from this or any similar cause. It was enough to show the situation and surroundings of the hydrant, and the circumstances attending the injury; then the question would arise whether the hydrant was properly placed with a view to public safety. And in case it should be found that it was improperly located, so as to constitute a nuisance in the highway, an action would lie for an

injury thereby occasioned, as well for the first of such injuries as for any subsequent one. The party would not be barred of his right of action until he could show a prior injury from the same or from a similar cause. This case differs from that of *Dougan v. The Champlain Transportation Company* (56 N. Y., 1), in this, that there it was shown affirmatively that the nonfeasance complained of was in accordance with the general custom in similar cases, hence not against common prudence. The case in hand more resembles *Blanchard v. Western Union Telegraph Company* (60 N. Y., 510), where a recovery was upheld, although the injury was the first that had occurred from the alleged cause; and notwithstanding other parties had frequently passed the obstruction without injury. Nor was the defendant here protected by reason of the judicial character with which its agents who placed the hydrant were clothed. This point was settled in *Clemence v. The City of Auburn* (66 N. Y., 250), against the defendant. This decision is but one of many to the like effect. (*Nims v. City of Troy*, 59 N. Y., 500, and cases cited on page 508.) These cases hold, that in making improvements in the public streets, and in keeping them in repair, the duty becomes imperative on the officers of the municipality to act with due regard to the safety of travelers, and that for any neglect or omission of duty in that regard an action will lie at the suit of any party specially injured thereby.

It appears that the horse was blind and was running away on the occasion of the accident, and the question is put, with fairness of statement and not without great force, whether the defendant was bound to provide a safe street for a blind runaway horse? It must be held in mind that there is no proof that the horse was vicious or addicted to running away, and that the plaintiff was free from fault in his management of the animal. Then the answer to the question is, that the defendant was bound to see to it, that the street was unobstructed for public use, or in more precise language, that it was reasonably safe for general travel. The plaintiff had a right to drive a blind horse on the public street; and if, without any fault attributable to him, he was injured while driving such animal, through the culpable misfeasance or nonfeasance of the defendant, the latter would be as much responsible to the former as if his horse had been entirely sound. (*Sleeper v. San-*

down, 52 N. H., 244.) For any thing that is made to appear with certainty, the same results, as in this case occurred, would have followed had the plaintiff's horse been without the infirmity of blindness. It is a common and true remark that a frightened horse running away is but a "blind brute." The mere fact that the horse was blind should not bar the plaintiff's right of action, but doubtless this should be considered in determining the question of prudent conduct on his part. Under many circumstances, if not under all, a person driving a blind horse is bound to the exercise of increased vigilance and care in its use. But the mere fact that a person is driving a blind horse when an injury occurs by reason of a defective highway, will not deprive him of the redress to which he would be otherwise entitled. (*Davenport v. Ruckman*, 37 N. Y., 568.) Of course he must be blameless in the management of the animal, otherwise he could not recover. Nor will the fact that the horse was running away at the time the injury occurred, necessarily defeat the plaintiff's action therefor. But in Maine the rule is, that in order to a recovery in a case like this, it must be proved that the injury was occasioned *solely* by the defendant's negligence, and not by such negligence combined with another cause (as the fright and running away of the horse), for which it was not responsible. (*Moore v. Abbot*, 32 Maine, 46.) In this case Chief Justice SHIPLEY said that to establish his action, the plaintiff must prove that the injury was occasioned by the default of the defendant alone, and not by that default and some other cause, for which the defendant was not responsible. (See, also, *Farrar v. Inhabts. of Greene*, 32 Maine, 574; *Anderson v. City of Bath*, 42 id., 346; *Bigelow v. Reed*, 51 id., 325; *Moulton v. Inhabts. of Sanford*, 51 id., 127.) It ought perhaps to be here observed that this rule was not deemed settled in this State (Maine), until the decision of Moulton's case (*supra*); and then only by a divided court, the chief justice delivering a very able dissenting opinion, wherein the subject is fully considered. There are cases in Massachusetts also substantially in accordance with the rule laid down in the courts of Maine. (But see *Palmer v. The Inhabts. of Andover*, 2 Cush., 600.) In New Hampshire, however, the law is settled that when the plaintiff is not in fault, but the injury is the combined result of accident and of the defend-

ant's neglect to repair the road, the latter will be held liable. (*Winship v. Enfield*, 42 N. H., 197.) In this case the learned judge, speaking for the court, says: "The greatest precaution and the most penetrating foresight cannot prevent casualties by the safest modes of conveyance. Accidents will occur. A nut or bolt may drop, a trace may become disengaged, or a horse take fright and become unmanageable; it is under circumstances like these, when life and limb are imperiled, that the traveler who is in no fault himself, is entitled, if ever, to the benefit of a sufficient and unincumbered highway. The injuries are few that are received upon highways, however defective, that are not induced, in a greater or less degree, by some previously unknown defect, either in the carriage or harness, or by the fright of the horse, or some similar cause, usually termed accidental; and to say that under circumstances of danger and peril from those and other accidental causes, the traveler is not entitled to the safety that a highway unincumbered and without defects, that is, a highway made reasonably safe against the occurrence of such accidents as these, would afford at a time when, of all others, he has the greatest need, would seem to be repugnant to reason and common sense." (See also *Clark v. Barrington*, 41 N. Hamp., 44; *Tucker v. Henniker*, 41 id., 317.) The decisions in Vermont accord with those in New Hampshire. (*Hunt v. Town of Pownal*, 9 Vt., 411; *Kelsey v. Town of Glover*, 15 id., 708; *Morse v. Town of Richmond*, 41 id., 435, on page 442; *Whitcomb v. Town of Fairlee*, 43 id., 671, on page 675.) And in Connecticut, in the case of *Baldwin v. Greenwood Turnpike Company* (40 Conn., 238), it was decided that a traveler, sustaining an injury by reason of a defect in a highway, attributable to the negligence of a corporation bound to maintain it, was not barred of his right to recover by reason of the fact that on his own part an accident had contributed to the injury, if it was in no way attributable to his own negligence. In this case the plaintiff's horse, when running away, fell over the side of a bridge, by reason of a defective railing which the defendant was bound to keep in repair, and was injured. The court, on a careful examination of the subject in all its bearings, held the defendant liable, laying down the law as above stated. The court remarked as follows: "This brings into consideration the question whether the defendants are relieved



from liability for an injury caused by their negligence, combined with an accident for which no responsibility attached to either party," and it was said in the examination of this question, "the plaintiff performed no negligent act, nor can we see that he failed to do any thing by the performance of which the injury might have been avoided; he was providentially prevented from acting;" and further, the court adopted with approval the following language from *Hunt v. Town of Pownal* (*supra*): "It is to guard against these constantly recurring accidents that towns are required to guard in building highways. The traveler is not bound to see to it that his carriage and harness are always perfect, and his team of the most manageable character and in the most perfect training, before he ventures upon the highway." (See also *Ward v. Town of North Haven*, 43 Conn., 148, on page 155.) The cases in the three States last above referred to, hold that the traveler is bound only to the exercise of ordinary care and prudence. In Pennsylvania also the rule is the same as in Vermont, Connecticut and New Hampshire. (*Lower Macungie Township v. Merkhoffer*, 71 Penn., 276; *Hey v. Phil.*, 81 Penn., 44.) The case of *Manderschiel v. City of Dubuque* (25 Iowa, 108) is also in point; as is also *Docher v. Town of Fitchburgh* (22 id., 675), *Houfe v. Town of Fulton* (29 id., 675), *Havens v. Town of Fox Lake* (33 id., 438). The result of all the decisions above cited, except those in Maine, are, as I understand them, in accordance with the rule laid down in *Kelsey v. Town of Glover* (*supra*), that it is the duty of a municipality, bound to construct and maintain highways, to provide for the reasonable safety of travelers in reference to such accidents as may be expected to happen thereon, and that when a traveler is not in fault, but an injury happens to him which is the combined result of accident and negligence, attributable to the municipality by an omission to keep the road in repair, the latter will be held liable. We are not cited to any case in our own State wherein this precise question has been considered. There were some remarks in *Wilson v. Susquehanna Turnpike Company* (21 Barb., 79) bearing upon it, but the question was not there decided. The case of *Clark v. Union Ferry Company* (35 N. Y., 485) may perhaps have a bearing on it. In this case the plaintiff took a young horse on to the ferry-boat, and when attempting to drive him off the boat he reared up, became frightened, backed against the chain at the rear

of the boat, which was defective and an insufficient protection, fell into the water, and was drowned. A recovery by the plaintiff was sustained. PECKHAM, J., speaking for the court, said: "An individual has a right to take a young horse on a ferry-boat. He may be timid or easily frightened, and yet the owner is guilty of no negligence in taking him on the boat. He must there exercise proper care in the management of the horse, *and that is all that can be required of him*. If the horse be injured or lost through the negligence of the defendant, the latter is liable." But the precise question discussed in the cases above cited was not here raised, as will be seen by a casual examination of this case. In *Wyckoff v. Ferry Company* (52 N. Y., 32) a recovery was sustained under a similar state of facts. In *Vincett v. Cook* (11 N. Y. S. C. [4 Hun], 318) the wall of the defendant's house being in a dilapidated condition, was blown down during a storm of unusual violence, falling upon the plaintiff. A recovery by the latter for the injury was sustained. In *Cox v. Westchester Turnpike* (33 Barb., 414) the plaintiff's horse was injured on the highway. It was held that negligence on the part of the defendant, the turnpike company, from which the injury resulted, and the exercise of ordinary care by the plaintiff, gave a right of action. (See, also, *Center v. Finney*, 17 Barb., 94.) It has been repeatedly held that where an injury is occasioned by the joint negligence of several, the party injured being himself without fault, may have his action against all or either of the persons causing the injury. (*Webster v. H. R. R. Co.*, 38 N. Y., 260; *Sheridan v. R. R. Co.*, 36 id., 39; *Colgrove v. R. R. Co.*, 20 id., 492; *Spooner v. R. R. Co.*, 54 id., 230.) Nor will the comparative degrees of culpability affect the liability of either. (*Barrett v. R. R. Co.*, 45 N. Y., 628.) Nor will it make any difference that the negligent acts were separate and independent of each other. (*Slater v. Mersereau*, 64 N. Y., 138.) If the negligence of a third party would not discharge another from liability whose negligence contributes to the injury, it is difficult to see on what principle an accidental circumstance, for which no one is responsible, can work that result. Undoubtedly the weight of authority is in favor of the rule of law laid down in those States other than Maine. It seems the more reasonable doctrine, and, as we think, it accords with sound principle. It seems but just and right that when the

plaintiff is without fault, and the injury is the combined result of pure accident and the defendant's negligence, the latter should be held liable. Highways should be constructed, protected and guarded in reference to possible accidents, and they should be made reasonably safe to travelers in case accidents should happen, as they must; such accidents as often do occur and may be expected occasionally to occur on highways. So where the antecedent cause is a pure casualty, then, as was said in one of the cases cited, the defect causing the injury must be deemed the *causa proxima*.

If correct in the above conclusions the judgment appealed from should be affirmed.

Judgment affirmed, with costs.

LEARNED, P. J., and BOARDMAN, J., concurred.

Judgment affirmed, with costs.

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SAMUEL B. PER LEE AND HENRY M. PER LEE, APPELLANTS, v. ANDREW J. BEEBE AND JEREMIAH MEDBURY, JR., RESPONDENTS.

*Contract — when divisible — Full performance — when not a condition precedent to recovery.*

Plaintiffs and defendants entered into an agreement, whereby the plaintiffs agreed to sell and deliver to the defendants all the coal they should want for their use, for a year, or until the next spring, at five dollars and fifty cents per ton, deliveries to be made as long as defendants should wish them, the defendants agreeing to receive the same at that price.

A large amount of coal was delivered under this contract; but subsequently and before the expiration of the time therein specified, the price of coal having risen, the plaintiffs refused to deliver any more coal under it. In this action brought by them to recover the value of the coal delivered, *held*, that the contract was not an indivisible one, and full performance was not a condition precedent to a recovery by plaintiff; that, as no time of payment was specified in the contract, they were entitled to demand the pay for each lot of coal delivered, and that they were therefore entitled to recover the price of the coal delivered, subject to the defendants' right to recoup any damages they might have sustained by reason of the breach of the contract.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

*Geo. W. Ray*, for the appellants. Full and complete performance by plaintiffs was not a condition precedent to payment by the defendants, because there was nothing in the terms of the contract, nor outside, that made full performance a condition precedent. (*Tipton v. Feitner*, 20 N. Y., 423; *Withers v. Reynolds*, 2 Barn. & Adol., 882; *Patridge v. Gildermester*, 1 Keyes, 93; *Sickels et al. v. Patterson*, 14 Wend., 256, 257; *Talmage v. White*, 3 Jones & Spencer; 35 N. Y. Sup. Ct. Rep., 218; *Swift et al. v. Opdyke et al.*, 43 Barb., 274; *Gardner v. Clark*, 21 N. Y., 399; *Bailey et al. v. The Western Vt. R. R. Co.*, 18 Barb., 112; *Snook v. Fries*, 19 id., 313; *Bowker v. Hoyt*, 18 Pick., 555; Parsons on Contracts [6th ed., vol. 2], 517-524, 657, etc.)

*Calvin L. Tefft*, for the respondents.

OSBORN, J.:

The plaintiffs appeal from the judgment entered against them on the report of a referee, dismissing the complaint with costs. The plaintiffs are merchants in Norwich, N. Y., and the defendants hotel keepers in the same place. From April, 1870, to February, 1871, the plaintiffs had sold and delivered goods to the defendants, amounting to the sum of \$572.60. On the 17th of May, 1870, and while this account was being made, the plaintiffs entered into an agreement with defendants (in parol), by which they agreed to sell and deliver to the defendants quantities of coal at an agreed price. It is in reference to this coal contract and the proper construction to be given thereto, that this litigation seems to have occurred. Under this contract, whatever it was in fact, the plaintiffs did furnish between the day it was made and January, 1871, at different times and in different amounts, a large amount of coal, in the aggregate seventy tons, or thereabouts. During this time the defendants had paid said plaintiffs money at different times, and which, after paying the store account, amounted to the sum of \$335.10, to be applied upon the coal which had been delivered. But this did not pay the coal account in full, and hence this action was brought.

There was a serious difference between the parties as to what were the actual terms of the coal contract, but as the referee has found the defendants' version to be the correct one, it remains to be seen whether he gave it a proper or rather a legal construction. He finds the contract to be as follows: "That May 17, 1870, the plaintiffs entered into a verbal agreement with the defendants, whereby the plaintiffs agreed to sell and deliver to the defendants all the coal they should want for their use, of all sizes, for a year, or until the next spring, or the opening of navigation the next spring, at five dollars and fifty cents per ton, and to deliver it along as defendants should want it, the defendants agreeing to receive the same at the said price. Nothing was said by the parties or either of them, as to the time of payment."

And the referee adds to this finding the following words: "Yet they did not contemplate a settlement and payment for each parcel when it should be delivered."

The referee then finds, that in pursuance of this agreement and in part performance thereof, the plaintiffs commenced delivering coal to defendants on many days, from time to time, until and including January 23, 1871, amounting in all to seventy-six tons or over. That in February, 1871, defendants were out of coal, and wanted plaintiffs to furnish them more under this contract, which the plaintiffs did not do, and no more was furnished afterwards. The referee finds that coal in the meantime had advanced in price, and that defendants were compelled to pay an advanced price for what coal they wanted after that, and that they required several tons more to carry them to the time provided for and specified in the contract. He also finds that from August, 1870, to February, 1871, defendants had paid plaintiffs on divers days divers sums of money, aggregating \$907.70, but such payments were not applied to any particular demand.

As a conclusion of law, he finds that, after paying the store account, there remained to apply on the coal account \$335.10, which plaintiffs could retain, but that they could not recover the balance alleged to be due for coal for the reason that such contract was entire and indivisible, and that, by the terms thereof, nothing was due until the same was fully completed and performed; "that full performance was a condition precedent to payment or to a right of recovery."

The plaintiffs gave a different version of this contract, but, as I stated before, the rights of the parties must be determined according to the contract as found; and just here it is proper to state that the statement of the referee following the contract, as found by him, "that the parties did not contemplate a settlement and payment for each parcel of coal when it should be delivered," amounts to nothing, and there is no evidence to sustain it aside from the contract itself. He says nothing was said by the parties as to the time of payment. Whether they did or did not mentally contemplate payment amounts to nothing. The question is, under the precise contract as found, were the legal conclusions of the referee correct? Was this an entire and indivisible contract, in such a sense that, before plaintiffs could exact payment for any amount, they were bound to wait until the time had expired and the last ton had been delivered?

I think not. It seems to me entirely clear, on principle and authority, that the referee erred in his conclusions. By an examination of the contract, it will be seen that nothing is said as to the time of payment. That the quantity to be delivered is not suggested; it is left wholly indefinite. It may require ten tons or a thousand to complete it, and so of the time when the several deliveries were to be made. By its very terms it is a contract to be performed in parts. Indeed, it is difficult to see how, in any sense, it can be regarded as an entire and indivisible contract, and, with due respect to the referee who finds differently, it would seem quite evident that the parties did not so treat or understand it, for the defendants paid and plaintiffs received a large amount of money at different times on account of the coal that was being delivered. But the language of the contract must control. From an examination of the authorities, I have come to the conclusion that this contract is one susceptible of part performance—one calling for the sale and delivery of coal at different times—making no provision in terms for any credit, and that, by its performance, a full and complete performance is not a condition precedent to payment for any part actually delivered. That the defendants could be called upon to pay for each parcel on delivery; that is, having delivered all the coal the defendants wanted at any particular time, the plaintiffs could demand and receive payment therefor, and that upon such payment being refused an action would lie.

In a word, that, under this contract, plaintiffs were entitled to recover for the coal actually delivered, subject to the defendants' right to recoup such damages as they may have sustained by the non-performance of the full contract. This would seem to be the equitable construction, and clearly sanctioned by authority. (*Tipton v. Feitner*, 20 N. Y., 423; *Withers v. Reynolds*, 2 Barn. & Adol., 882, cited and approved in 20 N. Y., 423; *Patridge v. Gildermeister*, 1 Keyes, 93; *Sickels et al. v. Pattison*, 14 Wend., 257; *Talmage v. White*, 3 Jones & Spencer, 35 N. Y. Superior Ct. R., 218.)

In this case it was shown that the defendants' actual damage was on account of the alleged non-performance. If this only had been allowed them, there would still have remained a balance due plaintiffs for which they would have been entitled to recover.

Entertaining the views already expressed in reference to this contract, it is unnecessary to examine the other points raised, for it follows that the judgment appealed from must be reversed, the reference discharged, and a new trial granted, costs to abide the event.

BOCKES, J.:

The conclusions of the referee, to which the attention of the court is called on this appeal, have reference to the coal contract only.

The referee found that the parties entered into a parol agreement, by which the plaintiffs were to furnish to the defendants all the coal they should want for their use for and during the year preceding the opening of navigation in 1871, at five dollars and fifty cents per ton, to be delivered from time to time as the defendants should want it; that nothing was said as to time of payments, but that they did not contemplate a settlement and payment for each parcel when it should be delivered; and, as matter of law, he decided, that although several parcels were delivered and accepted by the defendants, yet, because the plaintiffs in February and thereafter refused to make further delivery, the plaintiffs had no right of action for the coal delivered. The decision was put on the ground that the contract to deliver was entire and indivisible; and that no recovery could be had by the plaintiffs until the end of the year, and on its fulfillment by them during the entire time the contract was to run. I am of the opinion that the referee was in error in his construction of the agreement entered into by the

parties. It was understood that the coal should be delivered in parcels as the defendants should want it; and the calls were left optional with them as to time and quantity. Delivery was to be made on call, and the calls were to be answered by the plaintiffs from time to time, as they should be made during the period the contract was to run. The agreement was that the plaintiffs would deliver from time to time on call, at the price specified, during a year, or until navigation opened in 1871. Extend the time during which the contract was to continue for two, three, five, ten or twenty years, and could it be maintained that no claim for payment for any coal delivered could be made until the expiration of the full time the contract was to continue? Now, as no time of payment was expressly agreed upon, the ordinary legal inference must apply; that the plaintiffs were entitled to payment on delivery. This, we think, is the fair, reasonable and legal construction to be put upon the agreement according to the proof submitted. This construction is entirely just in application, too. The evidence fairly, and as we think, necessarily, sustains it. The referee's findings, both of law and fact, which are in conflict with this construction, are, as we think, erroneous.

The contract was fulfilled by the plaintiffs when they answered the defendants' calls for coal to the extent of the several parcels delivered to and accepted by the defendants. For the value of the coal so delivered, estimated according to the contract-price, the plaintiffs have a complete right of action.

Of course the defendants might recoup such damages as they should sustain by the refusal of the plaintiffs to deliver during the time the contract was to run; in the answer claimed to be sixty-two dollars and sixty-nine cents. The amount would depend upon the evidence.

The defendants, therefore, should have been charged with the coal delivered and accepted by them according to the contract, deducting from the claim by way of recoupment, the damages sustained by the refusal of the plaintiffs to deliver as they had agreed.

Judgment reversed, new trial ordered, costs to abide the event, and reference discharged.

LEARNED, P. J., concurred.

Judgment reversed, new trial ordered, reference discharged, costs to abide event.



ANNA M. HOAG, RESPONDENT, v. RICHARD PARR,  
APPELLANT.

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*Contract for sale of lands — note given upon signing contract — in an action upon the note plaintiff must prove performance of the contract — Tender.*

On November 15, 1875, the parties to this action entered into an agreement, whereby the plaintiff agreed to sell certain land to the defendant, and to deliver the deed on December fifteenth, the defendant to pay on that day a note for \$500, given when the contract was signed, and \$3,800 in cash, being the balance of the purchase-money.

In an action by the plaintiff upon the note, given at the time of the signing of the contract, *held*, that it rested upon her to prove a performance or tender of performance of the contract upon her part, and that, failing so to do, she was not entitled to recover.

There being no place specified in the contract for the delivery of the deed and the payment of the money, and the defendant being a resident of this State, the plaintiff was bound to find the defendant and make a tender to him personally, or at least to show that after thorough efforts and inquiries he was unable to find him.

In order to excuse a personal tender, it must appear that the defendant was out of the State, beyond plaintiff's reach, or else that he intentionally avoided him or kept out of his way.

APPEAL from a judgment in favor of the plaintiff entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

The action was brought upon a promissory note for \$500, dated November 15, 1875, and payable December fifteenth of that year. The answer was a general denial and an affirmative defense that the note was given in pursuance of a contract which the plaintiff had failed to fulfill. The contract was for the sale of certain land by the plaintiff to the defendant. The contract provided, among other things, as follows: "And the said party of the first part further agrees that, on the fifteenth day of December, on receiving from the said party of the second part the sum of \$3,800, the said party of the first part shall and will, at her own proper costs and expense, execute and deliver to the said party of the second part, or to his assigns, a proper deed of conveyance, duly acknowledged, for the conveying and assuring

to him and them the fee simple of the said premises free from all incumbrances, which deed of conveyance shall contain a general warranty and the usual covenants.

"And the said party of the second part hereby agrees to purchase of the said party of the first part the premises above mentioned at and for the price and sum above mentioned, and to pay to the said party of the first part the purchase-money therefor, in manner and at the times following, to wit: On the fifteenth day of December next a note given by the party of the second part for \$500, and a further sum of \$3,300."

It was insisted by the defendant that the plaintiff had never made a tender of the deed, and could not therefore recover upon the note.

*G. R. Hitt* and *R. W. Peckham*, for the appellant. The action was on a note, which was given at the same time as the contract, and to carry it out. To recover on the note, a tender or offer of the deed must first have been shown, for the payment of the price and the conveyance of the land were dependent or concurrent acts. (*Beecher v. Conradt*, 13 N. Y., 108; *Smith v. McCluskey*, 45 Barb., 610; *Holmes v. Holmes*, 12 id., 137; *Divine v. Divine*, 58 id., 264; *Thomson v. Smith*, 63 N. Y., 301-304.) The plaintiff failed to show a tender or an excuse for its absence, assuming the truth of the evidence upon her part. (*Slingerland v. Morse*, 8 Johns., 474; *Smith v. Smith*, 2 Hill, 351, correcting report of same case in 25 Wend., 405; *Leonard v. Smith*, 44 N. Y., 618.) There must be an intentional evasion or keeping out of the way to excuse the tender of the deed, or the party must be out of the State. (*Dwight v. Webster*, 32 Barb., 47; *Hale v. Patten*, 60 N. Y., 233; *Ferris v. Ferris*, 16 How., 102.)

*Alonzo P. Strong*, for the respondent. When the vendee is not entitled to his deed upon the payment sought to be recovered, delivery of deed is not a condition precedent. As instances of the application of this rule, we have *Morris v. Sliter* (1 Denio, 59), *Greenby v. Cheevers* (9 Johns., 126), *Harrington v. Higgins* (17 Wend., 376), *Robb v. Montgomery* (20 Johns, 15). In the case at hand, the defendant, reading the note and agreement of sale as an

entire contract, was not entitled to a deed upon payment of the note only, but upon the further act on his part of payment of the balance, \$3,300. Till that, or tender of it, the plaintiff was under no obligation to pass the deed. The matter stands, then, with the absolute, unconditional promise represented by the note on the one side, which is sought to be modified by the special contract on the other, that contract showing something still to be performed on part of defendant before plaintiff could be called upon to act. Even if failure of plaintiff to perform or offer to perform the contract of sale would prevent a recovery upon the note, the burden of proving such failure rests upon defendant, and exceptions of defendant based upon the contrary assumption are not well taken. The note, upon its face, is an absolute, unconditional promissory note. It, therefore, imports a consideration still subsisting, and the burden of proof rests upon the maker to establish the contrary. (Story on Prom. Notes, § 181; *Sawyer v. McLouth*, 46 Barb., 350; *Kinsman v. Birdsall*, 2 E. D. Smith, 395; *Bank of N. Y. v. Topping*, 13 Wend., 557, 569; *Prest Turnpike Co. v. Hurten*, 9 Johns., 216; *Bank of U. S. v. Davis*, 2 Hill, 451, 459.) If the absolute, unconditional promise to pay be varied by some contemporaneous written agreement, showing the note payable upon some condition only, such collateral agreement is matter of defense, to be pleaded, and the plea must negative the happening of the condition. (2 Parsons on Bills, 537; *Holbrook v. Wilson*, 4 Bosw., 64; *Jenninson v. Stafford*, 1 Cush., 168; *Smalley v. Bristol*, 1 Mich., 153; *Averill v. Field*, 3 Scram., 390; *Thayer v. Connor*, 5 Allen, 25.) The attendance by plaintiff's agent at the residence of the defendant, with deed executed and acknowledged, and the offer to complete and perform the contract on part of the plaintiff, under the circumstances disclosed, was a sufficient tender or offer to perform. The offer was properly made at defendant's house. The contract not specifying the place, a tender at the residence of the party is sufficient. (*Smith v. Smith*, 25 Wend., 405; *Martin v. Wells*, 1 Tyler [Vt.], 381; *Kensall v. Talbot*, 1 Marsh. [Ky.], 321; *Sweet v. Harding*, 19 Vt., 592.) Under the circumstances plaintiff was excused from making any effort to see defendant personally, and from making a personal offer or tender to him, and a tender at the residence was sufficient. (*Smith v. Smith*, 25 Wend.,

351; 2 Hill, 351; *Judd v. Ensign*, 6 Barb., 258; *Southworth v. Smith*, 7 Cush., 391; *Tasker v. Bartlett*, 5 Cush., 359.)

OSBOEN, J.:

The note upon which this action was brought was given on the same day as the written contract for the sale and purchase of certain lands in Schoharie county, executed by the parties. It was made due on the day the contract was to be consummated by the delivery of the deed and the payment of the residue of the purchase-money, \$3,300. Indeed, the note was given for a portion of the purchase-price, and its consideration was clearly and only for the conveyance of the lands to be made December 15, 1875, the very day the note became due.

In my judgment the plaintiff could no more recover on this note without showing a performance of the contract, viz., the execution and delivery of the deed called for thereby, or a tender of performance, such as the law requires, than she could recover in an action for the residue of the purchase-money. Indeed, it was tried upon this theory at the Circuit, and while there was some dispute as to which party had the affirmative of this issue, the learned justice who presided at the trial regarded this as a necessary and vital issue. This is apparent from the case as made, from the evidence given and the charge of the judge. It is not pretended that there has ever been a delivery to the defendant of any conveyance as called for by the contract, but the defendant still is in possession and still retains the title of the lands embraced therein.

But it is claimed that there was a sufficient tender of performance by plaintiff to put the defendant in default. The lands which were the subject of sale are located in Schoharie county. The plaintiff resides in Schenectady, and the defendant in the city of Albany. In the contract there is an omission to designate any place for the delivery of the deed or the payment of the money. On the day named for the delivery of the deed the plaintiff's husband came to the city of Albany with a deed duly prepared and executed, and went to the defendant's house and there had an interview with the wife of defendant. Just what took place, or rather what was said on that occasion by the plaintiff's husband and the defendant's wife is the subject of some conflict, but as the jury found for the plain-

tiff we must assume, for the purposes of this appeal, the truth of the statement or evidence given by him on the trial.

Assuming all this to be true, there was no such tender or offer of performance on the part of the plaintiff as would enable her to recover the purchase-price, or on this note, or to maintain an action for a specific performance. Very likely enough was done to excuse plaintiff, if defendant should undertake to maintain an action against her on account of this contract, but not enough to put defendant in default so as to recover against him in any form of action. It must be borne in mind that, under this contract, taken in connection with the note, the payment of the note, the payment of the residue of the purchase-price and the conveyance of the land, were dependent and concurrent facts. (*Beecher v. Conradt*, 13 N. Y., 108; *Thomson v. Smith*, 63 id., 301-304.)

If the defendant wished a conveyance it was his duty to go to the plaintiff, tender payment on his note, the residue of the purchase price, and demand a deed. On the other hand, if plaintiff desired her money she was bound to go to defendant, tender to him a conveyance such as was called for in the contract, and such as would convey to him a title free and clear of all incumbrances, and demand her money. It is not pretended that, prior to the day fixed for the performance, the defendant had ever said or done any thing that would relieve the plaintiff from doing every thing that the law requires in order to put defendant in default. When the husband of plaintiff called at defendant's house and stated that he had his deed ready to deliver, he found Mrs. Parr; her husband, though not in the house, was in the city all that day, and was at the very place where plaintiff's husband was informed he could be found. And yet the plaintiff's agent contents himself with that one call and one interview, on that day, and with no other or further effort to find defendant, or to have a personal interview with him. The defendant swears, and this is uncontradicted, that he told his wife before leaving home to inform plaintiff where he could be found in the event of his calling, and he was at the place named during the entire day, as is most conclusively established.

True, the plaintiff's husband testifies that she told him he had better not try to see defendant, as he was much excited over some important suit which he had in court. But this amounted to

nothing, even if she had authority to make any such statement, which does not appear. There is no evidence from which a pretense can be drawn that defendant purposely absented himself from his home on that day or at any other time, to avoid meeting plaintiff or her agent, or that he kept himself secreted or concealed for any such purpose. On the contrary, he was in the court room nearly all day, awaiting the trial of an important case in which he was interested. The husband of plaintiff then left. He exhibited no deed, nor does it appear that he made any further effort or inquiry to find defendant on the occasion. On two different occasions after that day—on December twentieth and February eleventh—he called at defendant's house, the defendant being absent on each occasion, and he did not see him at all after that before this action was commenced.

These are all the facts bearing on the question of the plaintiff's tender of performance, or any attempted tender of performance. It seems to me that they fall far short of establishing what was necessary, in order to make a sufficient tender of performance to enable plaintiff to maintain any action, based upon the failure of defendant to keep his contract. There being no place specified in the contract for the delivery of the deed and the payment of the money, the plaintiff was bound to find the defendant and make such tender to him personally, he having a residence within this State; at least he was bound to show that, after thorough efforts and inquiries, he was unable to find defendant to make such tender. No well-adjudicated case can be found that will sustain the position that here was a sufficient tender of performance to enable plaintiff to maintain any action, whether upon the note to compel specific performance, or for damages. (*Slingerland v. Morse*, 8 Johns., 474; *Smith v. Smith*, 2 Hill, 351; *Leaird v. Smith*, 44 N. Y., 618.) The rule seems to be well settled, that in order to excuse the tender to defendant personally, he must be out of the State, beyond the reach of the plaintiff, or else there must be intentional evasion or keeping out of the way. It will not answer to say that because the defendant was temporarily from his residence when the plaintiff or her agent called, that he is relieved from any further effort or diligence to make the tender. (*Dwight v. Webster*, 32 Barb., 47; *Hale v. Patton*, 60 N. Y., 233; *Ferris v. Ferris*, 16 How., 102.)

As I am entirely satisfied that the tender of performance, as proved in this case, was insufficient to warrant the verdict or even the submission of the case to the jury, it is unnecessary to examine the other questions raised by the defendant—one as to whether the court erred in his decision as to which party was charged with the burden of proof, and another as to whether this action could be maintained, assuming there had been a complete tender of performance, and refusal; in a word, whether the plaintiff's only remedy in that event would not be a bill in equity to enforce specific performance, or an action at law to recover damages?

It follows, from what has been stated, that the judgment appealed from must be reversed and a new trial granted, with costs to abide the event.

BOOKES, J.:

Passing the preliminary and formal proof, preceding the introduction of the contract, we take the case as it stood on the trial at the time and following the reception of that paper in evidence. The case may then be considered as if the note in suit and the contract of purchase and sale (wherein the note had its origin) were put in evidence simultaneously. Having this preliminary proof as a basis, the action was an action at law to recover part of the purchase-money, by the defendant agreed to be paid to the plaintiff for certain premises which the latter had contracted to convey to the former, free from all incumbrances. The deed was to be delivered and the purchase-money was to be paid at one and the same time. The obligations of the parties were, therefore, concurrent and dependent. The contract provided for simultaneous performance by each, so neither was bound to perform, save on performance or tender of performance by the other. The plaintiff, then, in order to establish her right of recovery for the purchase-money, was bound to show performance or a tender of performance on her part. A refusal to accept performance, or a readiness and willingness to perform at the time and place where performance may be required, has sometimes been held to be tantamount to a tender. But until proof be given of performance or its equivalent by the party suing at law, his right of action remains incomplete. This proof, as has been suggested, was a prerequisite to the right of recovery by the

plaintiff in this case, yet the contrary of this seems to have been held at the trial. Instead of requiring the plaintiff to show performance on his part, the onus of proof was cast on the defendant to establish the plaintiff's default.

This ruling was made principally, if not entirely, on the ground that the defendant had given his note for the part of the purchase-money sought to be recovered. But this fact, under the circumstances of this case, in no way changed the obligations of the parties as regards the duty of performance by them respectively, with a view to a right of action by one against the other, as it was expressly provided in the agreement that the note in suit should be paid, with the balance of the purchase-money, on the fifteenth of December, at which time the conveyance of the premises, free from incumbrances, was to be made and delivered. On looking into the contract it will be seen that delivery of the deed by one party, and payment of the note and money by the other, were to be simultaneous acts. That a part of the purchase-money agreed to be paid was evidenced by a note in the hands of the plaintiff made the case no different on the law, from what it would have been had no note been given. The requirements of the law remained the same, to wit, that before the plaintiff could recover the purchase-money, she was bound to show performance or tender of performance on her part. The theory of the trial, on which the various rulings were made, was this: that the plaintiff had an "*advantage*" in holding the note given for part of the purchase-money, and so the learned judge charged that the effect of such advantage was to cast upon the defendant the burden of showing the plaintiff in default. The defendant was held to this rule to the end of the trial. In this the learned judge was in error.

It is suggested that this question of tender of performance or its equivalent was submitted to the jury, and was determined by them in favor of the plaintiff. The answer to this suggestion is: First, that it was submitted to the jury under the erroneous rule above indicated, a rule which gave the plaintiff an illegal advantage in its determination; and second, it was held in effect, that the plaintiff might recover without showing performance on her part, and in point of fact the evidence will not sustain a finding that the plaintiff either performed or tendered performance, for it appeared that the



premises were apparently incumbered. If it be said that the apparent incumbrances were in fact satisfied, it must be replied that such proof was not given, and by the court was held to be unnecessary.

Judgment reversed, new trial ordered, costs to abide the event.

LEARNED, P. J., concurred in the result.

Judgment and order reversed, and new trial granted, costs to abide event.

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JOHN T. BENHAM, ADMINISTRATOR, ETC., OF JOHN P. BENHAM, DECEASED, APPELLANT, v. EBENEZER PENNOCK, IMPEADED WITH BENJAMIN F. CADY, RESPONDENT.

*Mortgage—direction to pay part of the amount thereby secured to the heirs and executors of the mortgagee—effect of assignment by mortgagee—payment to assignee.*

One Benham conveyed certain real estate to one Pennock, and took back a purchase-money mortgage for \$3,800, as to \$1,400 of which it was provided that, as Benham's wife had refused to join in the deed, it should be set apart as an indemnity against her claim of dower, the interest to be paid to Benham during his life, and in case he survived his wife, the principal to be paid to him or his heirs, executors or administrators; in case she survived him the interest to be paid to her during her life, if she elected to receive it instead of claiming her dower, and if not, then no interest to be paid until her death, but the principal to be paid within twelve months thereafter to the heirs, executors or administrators of Benham. Benham assigned the mortgage, and the same was paid and by the assignee satisfied of record. The wife survived the husband and elected to take the interest of \$1,400, instead of her dower. After her death the administrator of Benham brought this action, claiming that Benham had no right to assign the mortgage; that the \$1,400 therein reserved was made a trust fund for the benefit of Denham's heirs, and that the payment to the assignee did not satisfy the same.

*Held*, that the assignment by Benham was valid, and that the payment to the assignee satisfied and discharged the mortgage.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

On March 23, 1863, John P. Benham, plaintiff's intestate, conveyed certain real estate to the defendant Pennock, and took

back a purchase-money mortgage for \$2,800. As Benham's wife did not join in the conveyance, the bond to which the mortgage was collateral, provided as follows :

"Whereas, the wife of said Benham has not and will not join in the execution of said conveyance, and a certain inchoate claim of her right of dower will remain as a cloud upon the title of said farm to the prejudice of said Pennock and Cady, against which it is desired by the parties thereto to protect and indemnify said Pennock and Cady, as far as may be ; "Now, therefore, it is agreed that said \$2,800 shall be paid as follows: That is, \$1,400 are hereby set apart, and is to be considered as a standing indemnity on interest against said claim of dower, and in the hands of said Pennock and Cady, the interest thereon to be paid to the said Benham annually, from the first day of April next, for and during the natural life of said Benham, provided he shall die before the wife of said Benham ; but in case said wife shall die before said Benham, the said \$1,400 and interest shall be paid to said John P., or his heirs, executors or administrators, within twelve months after the death of his said wife.

"And it is further provided that if said John P. Benham shall die, leaving his said wife surviving, and his said wife shall elect to take the use of the one-third part of said farm, to be set apart to her, instead of the use of the interest thereof, then no interest is to be had upon said \$1,400, from and after the time of the death of said John P., during the lifetime of said wife, and upon the death of said wife, said \$1,400 shall take interest, and the principal itself to be payable within twelve months after her death, to the heirs, executors or administrators of said John P. Benham ; and in case said wife shall, on the death of said John P., so elect to take the interest upon the said \$1,400, as and for her dower use, then the said interest which shall accrue after the death of the said John P., shall be paid to the said wife, from and during her natural life, and upon her death, the unpaid interest and the said \$1,400, shall be due and payable from said Pennock and Cady to said heirs, executors and administrators of said John P., within twelve months after the death of the said wife ; the name of said wife being Elizabeth Benham."

On February 6, 1865, Benham assigned the mortgage to one Barlow, who thereafter, and on the 14th day of May, 1875, assigned

the same to one Cornell, to whom the whole amount due and secured thereby was, on December 17, 1875, paid and the same was by him duly satisfied and discharged of record.

Benham died on April 28, 1870, leaving him surviving his wife, who elected to receive the interest on the \$1,400, instead of claiming her dower in the property, and did accordingly receive it, until the time of her death on or about, July 13, 1873. The plaintiff is the administrator of Benham, and brought this action to recover the amount claimed to be due thereon.

*Henry A. Merritt*, for the appellant. The \$1,400 reserved by the bond was made a trust fund for the benefit of Benham's heirs, and the addition of the words "executors and administrators" only referred to a class through which that fund must necessarily pass to be distributed. (*Bucklin v. Bucklin*, 1 Keyes, 141; 1 R. S., part 2, chap. 1, art. 3, § 108 [735], 685 [Edm. ed.]; *Fellows v. Hemans*, 4 Lans., 230, 239; *Patterson v. Murphy*, 17 Eng. L. and Eq., 287.) A trust can be created in favor of one's heirs as a class. (*Harding v. Glyn*, 1 Atk., 469; 5 Ves., Jr., 501; 8 id., 571; 2 Sugden on Powers, 159, §§ 6, 7; *Brown v. Higgs*, 4 Ves., Jr., 708; *In re Ann Fero et al.*, 9 How. Pr., 85; 2 Sugden on Powers, 160, § 9.) No form of words is necessary to create a trust. Where it appears to have been the intention of the parties to create one it is the duty of the court to declare and enforce it. (*Norman v. Burnett*, 25 Miss., 183; *Pratt v. Ayer*, 3 Chand. [Wis.], 265; *Starr v. Starr*, 1 Ohio, 321; *Brown v. Combs*, 29 N. J. L. [5 Dutch.], 36.)

*D. D. Walrath*, for the respondent.

OSBORN, J.:

This action was tried at the Schoharie Circuit before Mr. Justice INGALLS, without a jury, in January, 1877, upon an admitted state of facts. Upon these facts the learned justice ordered judgment for defendant, with costs, and from the judgment entered thereon an appeal was taken to this court.

The plaintiff's claim is, that by the terms of the bond on which the action is brought, the sum of fourteen hundred (\$1,400) dollars reserved therein, was made a trust-fund by plaintiff's intestate for

the benefit of his heirs, and that notwithstanding its assignment by the intestate in his lifetime, for a full and valuable consideration together with the mortgage accompanying the same, and by the assignee named in the first assignment, afterward reassigned; and notwithstanding the fact that the full amount due thereon was paid to such last-named assignee before the commencement of this action, who acknowledged the complete satisfaction of such bond and mortgage, this action can be maintained.

This position of the plaintiff is clearly untenable, and the authorities cited by the counsel have no application to the facts conceded in this case. The intention of the parties to the bond and mortgage is obvious. The wife of the plaintiff's intestate refused to unite with him in a deed of certain premises of which he had the fee. To protect the purchasers against any loss from and on account of the inchoate dower right of his wife, a certain portion of the purchase-money or price was reserved and this bond and mortgage given. This sum so kept back and reserved was simply to protect and secure the grantee under his deed, by leaving one-third of the purchase-price unpaid upon the mortgage and bond, from and against any interest of his wife in said premises, in the event that she outlived him. The language of the bond, so far as it affects this action, is as follows: "The sum of \$1,400 is set apart and to be considered a standing indemnity, on interest, against said claim of dower, the interest to be paid to the said Benham (the intestate) annually during his life. In case he outlives his wife, the whole sum to to be paid to him or his heirs, executors and administrators twelve months after her decease." In the event that the wife survived her husband and should elect to have one-third of the premises set apart for her use, instead of taking the interest on the sum so reserved, then no interest was to be paid on the sum secured by the bond and mortgage during her life, but the principal sum and interest from her death to be due and payable twelve months thereafter, "to the heirs, executors and administrators of John P. Benham," the intestate. But in the event that she should take the interest on the \$1,400 so secured, "and this she did, having outlived her husband," then in that event, upon her death the unpaid interest and the principal sum were, by the terms of said bond, made due and payable, "to the heirs, executors and administrators of the said

intestate" twelve months after his death. The intestate assigned all his interest in the bond and mortgage in his lifetime, as he had a right to do. Its conditions, so far as the wife's interest was concerned, had been complied with, and before this action was commenced the bond and mortgage had been fully paid to the owner and holder thereof. It would be manifestly unjust to the obligors to be obliged to pay twice, unless some principle of law requires it, and from a careful examination I am satisfied such is not the case.

The judge at the Circuit was right in his conclusions of law upon the undisputed facts, and the judgment appealed from must be affirmed, with costs.

LEARNED, P. J., and BOOKES, J., concurred.

Judgment affirmed, with costs.

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ALMIRA CUCK, APPELLANT, v. MILTON QUACKENBUSH,  
AS EXECUTOR OF DAVID QUACKENBUSH, DECEASED,  
RESPONDENT.

*Services rendered by married woman — husband must maintain action for —  
Mutual account — proof of.*

This action was brought by the plaintiff, a daughter of David Quackenbush, deceased, against his executor, to recover for services rendered by her in attending upon her father during his last illness, she being then married and living with her husband. *Held*, that the husband, and not the plaintiff, was the proper person to bring the action.

She also claimed to recover for services rendered before her marriage, to which the statute of limitations was pleaded. To remove the bar of the statute, she proved an account in which she had charged her father with the services and credited him with various amounts, the credits being for such articles as a father would naturally give to a daughter living with him, although of age. No account was kept by her father. *Held*, that the simple presentation of an account containing such credits to the executor was not sufficient; that an account of her father against her should be regularly proved, in order to have the effect of taking the case out of the statute.

APPEAL from a judgment in favor of defendant, entered upon the report of a referee.

*Bundy & Scramling*, for the appellant.

*S. S. Burnside* and *J. H. Keyes*, for the respondent.

OSBOEN, J. :

The plaintiff, who is a daughter of David Quackenbush, presented a claim against his estate, to the defendant, the executor, and claimed there was due to her thereon for principal and interest nearly the sum of \$3,000; with the exception of a few dollars, this amount was made up as follows: For her services in working for her father and in his family for twelve years, from 1850 to 1862, after she attained her majority and before her marriage; also for some forty days' service after her marriage in attending upon her father in his last illness, this last service rendered in 1873. The executor rejected the claim and it was by consent duly referred by the surrogate of Otsego county, to Hon. Edwin Countryman, as sole referee to hear and determine the same. As to any claim for services rendered by plaintiff before her marriage, the learned referee held that the same was barred by the statute of limitations, while as to the claim for services rendered after her marriage, she could not recover for the reason that such claim belongs to her husband and that he only could maintain the action for that, and as a conclusion of law that defendant was entitled to judgment. Judgment was entered and plaintiff appealed therefrom to this court.

The plaintiff insists that the referee erred in holding that the statute of limitations attached to any portion of the demand in question, for the reason that there was an open, mutual and subsisting account between the parties through all these years, for articles furnished to her by her father, and also for \$500 paid by him to her in 1870, on account of this labor.

As to the money paid, it would seem to be entirely clear that the claim that it was paid on account of this work, or that it can be regarded as a charge tending to establish an open account, is entirely unwarranted. A receipt for such money was given back, signed by the plaintiff and her husband, and speaks of it as money advanced

by him, deceased, to apply to her portion of his estate, as an heir at law. It had no reference to any account or demand she had. It was a simple advancement, or in the nature of an advancement. After the plaintiff attained her majority, she lived with her father and in his family as before, and was treated as before; the residue of the account claimed by way of credits seems to be for clothing and so forth, just such articles as a parent would naturally furnish to a daughter living with him, although over age. It is not pretended that the deceased ever kept any account against his daughter. It is one presented by the plaintiff, with the evident purpose of avoiding the statute of limitations. But the pretended account was not proved. The account as presented to the executor contained these credits. This was offered in evidence and rejected. If plaintiff desired to prove any account of her father against her, so as to show an open, mutual, subsisting account, she was certainly obliged to make proof of it in the ordinary way of proving an account. Simply crediting him on her account with articles furnished would not answer, when she was the one trying to establish the credit. In the case of a promissory note, outlawed except for an indorsement of payment, such payment must be proved. Not so where it is not necessary to rely on the payment to keep the note alive. So in this case. Her claim was barred unless deceased had an open account against her. Can she prove it by simply offering a paper of her own production on which she has given such credits? It seems to me clearly not. There was then no proof before the referee, of any account on behalf of the father against the plaintiff, and the proof offered was clearly incompetent and properly rejected. This being so, the referee committed no error in his refusal to find as requested.

As to the claim for services rendered after her marriage I see no reason for not following the decision of *Beau v. Kiah* (4 Hun, 171), holding that for such services the husband must bring the action. (See also *Birkbeck v. Ackroyd*, 11 Hun, 365; N. Y. Weekly Digest, 4th vol., 576.)

The fact that the executor was willing or offered to pay plaintiff thirty-five dollars on her claim as presented for services, etc., and in payment thereof, does not change the legal rights of these parties. She did not accept it. He may have thought she was entitled to

recover for her services rendered after her marriage and in her own name. But this does not make it so; or he may have thought it advisable to pay something, rather than involve his estate in litigation. It is enough to say that plaintiff refused to accept this sum, and the parties now stand precisely as though no such offer had been made.

I have looked at this case with care—have examined the evidence and the authorities cited—and am unable to see that any error has been committed by the referee in his conclusions of fact or law.

The judgment appealed from must, therefore, be affirmed, with costs.

LEARNED, P. J., and BOCKES, J., concurred.

Judgment affirmed, with costs.

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DAVID SHELP, APPELLANT, v. HATTIE R. MORRISON,  
RESPONDENT.

*Refusal, of party to action, to produce paper — contempt — striking out complaint.*

Upon the trial of this action, brought to foreclose a bond and mortgage, in which the defense was payment, the plaintiff having been subpoenaed to produce the bond was called as a witness and asked if he had it, to which he said he did not have it; that he did not have it in his possession when subpoenaed. The court then stated that the question was, whether he had control of it. After about an hour had been occupied by counsel in his efforts to find out where the bond was, the counsel for the plaintiff stated that he had it in his pocket, and being asked by the court if he would produce it said that he declined to do so at present, whereupon the justice ordered the complaint to be stricken out. *Held*, that this was proper.

APPEAL from a judgment in favor of the defendant, entered upon an order made at the Circuit striking out the plaintiff's complaint.

*J. E. Dewey*, for the appellant.

*M. L. Stover*, for the respondent.



OSBORN, J. :

This appeal is from a judgment entered against plaintiff and in favor of defendant for fifty-nine dollars and fifty-seven cents, the complaint having been stricken out by the court. The action was for the foreclosure of a mortgage executed by the defendant in 1870, to one Edwin Groat, for the sum of \$585 and interest, upon certain lands and premises in Montgomery county. Accompanying the mortgage is a bond in the usual form. This bond and mortgage was duly assigned by Groat to one John F. Morris, and afterwards by Morris to one Myndert Wemple, and by Wemple, in January, 1877, to plaintiff, who, in about a week thereafter, commenced this action, and in the complaint claims that there is due and unpaid thereon fifty-eight dollars and sixty-eight cents, with interest from June, 1876. The answer simply alleges payment in full, and upon this issue the cause came on to be tried in October last at the Montgomery County Circuit. On the trial, Justice POTTER holding such Circuit dismissed the complaint, and the only question presented for review on this appeal is, whether he was authorized in so doing.

The defendant had subpoenaed the plaintiff to produce the bond in suit, and after the plaintiff had rested, and the defendant was endeavoring to establish the defense of payment, the plaintiff was called as a witness and testified that he had been subpoenaed to produce the bond, but that he did not have it; that he supposed he was the owner of the bond and mortgage; he further stated that he did not have the bond in his possession when he was subpoenaed, and did not know as he had ever had it in his possession exactly. At this point the court stated "that the question was, whether witness had it or ought to have it, or has got control of it." The counsel for the defendant then stated to the court that it was proved that the witness was the owner of the bond and mortgage, and asked if the court denied a motion to strike out the complaint, and the reply was "yes, on the present state of facts." He further said to the counsel, "find out where the bond is." Just at this point, Mr. Dewey, counsel for the plaintiff, remarked that he had the bond in his pocket, and upon being asked by the court if he produced it, he replied that he declined to do so at present, and was proceeding to make some further state-

ment when the learned justice ordered the complaint stricken out, to which an exception was taken. The question now is, was this court legally empowered or authorized to do this?

It would seem from the record as though this whole discussion in reference to the production of this bond occupied but a moment, and yet it is apparent from a remark made by the judge that an hour or thereabouts was consumed in the effort to find out from the plaintiff where the bond was, and if possible to procure its production. All this time it was in the custody of the plaintiff's counsel, there in court, and that fact was undoubtedly known to the plaintiff. It was the plaintiff's instrument; he owned it; he had been subpoenaed to produce it. It had, without question, been the subject of conversation between plaintiff and his counsel. In one sense it was in plaintiff's possession and under his control, while he was evasively answering the questions put to him with a view to its discovery. Such conduct is clearly contumacious, and such a practice is not to be tolerated. It was an unnecessary waste of time, an evident trifling with the court and not at all in keeping with the due and orderly administration of justice.

When the discovery was made, I think the counsel should at once, upon the request or suggestion of the court, have produced it. This he declined to do at that time, and for this refusal, taken in connection with all that had transpired previously, I think the court was justified in striking out the complaint. (Code, § 858; *Brett v. Bucknam*, 32 Barb., 655; *Bonesteel v. Lynde*, 8 How., 226; *Gaughe v. Laroche*, 14 id., 451; *Valiente v. Dyckman*, 24 id., 222; *Boynton v. Boynton*, 25 id., 490.)

It can easily be seen how this paper might be of the greatest importance to the defendant; *non constat*, its production would establish the alleged payments by the indorsements appearing thereon. I see no force in the offer which was made to show that the bond and mortgage had passed into the hands of a receiver. The bond was in court and this proof, if made, would furnish no excuse for its non-production, nor is there any force in the point raised by the appellant that the contents of the subpoena do not appear, or the time when service of the same was made. No such objection or suggestion was made at the trial, and it cannot now be urged here. Indeed, as this was a material paper and in the pos-

session of the plaintiff or his counsel on the trial, the court, on request of the defendant, could order its production, and if refused could properly strike out the complaint as was done in this case, although no subpoena or notice had been served. (See cases above cited.)

It was quite evident that for some reason or other the plaintiff and his counsel did not propose to present this bond, for, after the court had ordered the complaint stricken out, no offer was made to produce the same. If this had been done the court might have, and quite likely would have, reconsidered its action. The offer was to prove something by way of excuse for not producing it, and which, if proved, as we have seen, would not have amounted to any legal excuse.

For the reasons stated, the judgment appealed from must be affirmed, with costs.

LEARNED, P. J., and BOCKES, J., concurred.

Judgment affirmed, with costs.

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ELISHA COMSTOCK, APPELLANT, v. ELECTUS DYE AND  
FRANKLIN CARPENTER, SHERIFF OF SARATOGA COUNTY,  
RESPONDENTS.

*New trial on ground of newly-discovered evidence — costs of former trial — must be paid by applicant for.*

A new trial, on the ground of newly-discovered evidence, should only be granted upon condition that the party applying therefor shall pay the costs of the former trial.

APPEAL from an order made at the Special Term, setting aside a judgment in favor of the plaintiff entered upon the report of a referee, and a levy made under an execution issued thereon, and directing a new trial, costs to abide the event.

P. H. Cowen, for the appellant.

L'Amoreaux, Dake & Whalen, for the respondents.

*Per Curiam:*

On the trial of this action one Luther was called as a witness for the plaintiff. He testified that he was not the owner of the claim in suit, but that he had a power of attorney to collect it, and that

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the power of attorney could not be found. Other evidence was given tending to show that the instrument, executed by the plaintiff to Luther, was not an assignment of the claim, but only a power of attorney. The defendants were, therefore, unable to give any evidence of statements made by Luther, tending to invalidate the claim. Since the trial it has been discovered by the defendants that the instrument mentioned was an assignment of the claim. They moved, therefore, to set aside the judgment and report of the referee, and the motion was granted, the costs to abide the event.

This was substantially a motion for a new trial upon newly-discovered evidence. The rule in such cases is that the motion, when granted, is on the terms that the moving party pay the costs of the former trial. In this present case the learned justice, who granted the motion, probably thought that a fraud had been practiced by the plaintiff, and that for this reason the defendants should not pay the costs. It may be that, so far as Luther is concerned, this view is correct. But the plaintiff is not distinctly connected with any supposed fraud on the trial. And although, on the affidavits, it appears now that Luther is at least the principal owner of the claim, still the plaintiff may, on another trial, be able to contradict Luther's ownership. We cannot therefore assume, beyond doubt, that Luther is the only person affected by this question of costs.

And there are general reasons why the right to a new trial on newly-discovered evidence should be granted with caution and upon terms. Parties should make every preparation for the trial as if it were to be final. It is only as a favor that they can have a new trial on the ground that they have better evidence to produce. Under all the circumstances we think that this case should follow the ordinary rule. And the order must be modified so that the relief granted shall be on payment by the defendants, within twenty days of notice of this order, of the costs and disbursements of the former trial and of entering judgment, as already taxed.

No costs on this appeal to either party.

Present — LEARNED, P. J., BOCKES and OSBORN, JJ.

Order modified so as to set aside judgment and grant new trial on payment of costs of former trial and of entering judgment. No costs of this appeal.

IN THE MATTER OF THE GUARDIAN MUTUAL LIFE INSURANCE COMPANY.

IN THE MATTER OF THE WIDOWS AND ORPHANS' BENEFIT LIFE INSURANCE COMPANY.

IN THE MATTER OF THE NEW YORK STATE LIFE INSURANCE COMPANY.

IN THE MATTER OF THE RESERVE MUTUAL LIFE INSURANCE COMPANY.

*Receiver of insolvent insurance company — not entitled to security deposited with superintendent of insurance department — chap. 463 of 1853.*

A receiver of an insolvent insurance company, appointed under chap. 463 of the Laws of 1853, is not entitled to have transferred to him the securities deposited by the company with the superintendent of the insurance department.  
*Chapman v. Ruggles* (59 N. Y., 163) and *People ex rel. Ruggles v. Chapman* (64 N. Y., 557) followed.

APPEAL from an order of the Special Term directing the superintendent of the insurance department to transfer to the receiver of the above companies securities to the amount of \$400,000, which had been deposited with him by those companies, under chapter 463, Laws of 1853.

*A. H. Schoonmaker, Jr.*, attorney-general, and *E. W. Paige*, for the appellant, the superintendent of the insurance department.

*Peckham & Tremain*, for the respondent, *H. R. Pierson*, receiver, etc.

LEARNED, P. J. :

In the case of *Ruggles v. Chapman* (59 N. Y., 163) the Court of Appeals decided that the receiver of the Eclectic Life Insurance Company was not entitled to have a transfer to him of the securities deposited with the superintendent of the insurance depart-

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ment. The receiver in that case was appointed under the provisions of the Revised Statutes, in a suit brought by a creditor and a stockholder.

In the present cases the application for a similar transfer is made by a receiver appointed under chapter 463, Laws of 1853. And it is urged, on his behalf, that the foregoing decision is not applicable; because in the seventeenth section of that act it is declared that the court shall decree a dissolution of the company and a distribution of its effects, *including the securities in the hands of the superintendent*.

But a statute was passed in 1875 in regard to that Eclectic Life Insurance Company to facilitate the distribution of its effects. (Laws of 1875, chap. 337.) That act recited the appointment of a receiver of the company, and provided that the attorney-general might apply to the Court of Common Pleas for an order directing the distribution of the securities deposited with the insurance department; and that upon the granting of such order the superintendent of that department should transfer such securities as might thereby be directed. That act therefore gave substantially as much power to the Court of Common Pleas in the action which had been commenced by a creditor, and as to the Eclectic Insurance Company, as is given by chapter 463 of the Laws of 1853 to the Supreme Court in proceedings taken by the attorney-general, as to life insurance companies generally. After the passage of that act the receiver of that company obtained an order from the Court of Common Pleas, directing the transfer of those securities to the receiver. And thereupon a *mandamus* was granted in the Supreme Court to compel the superintendent to make such transfer. On appeal to the Court of Appeals, the order for a *mandamus* was reversed. The court held that the transfer of the securities from the superintendent to the receiver was not contemplated by the act, nor authorized by its requirements. They held that the transfer was a needless proceeding, which might increase expense and be detrimental to those who were interested in the fund. (*People ex rel. Ruggles v. Chapman*, 64 N. Y., 557.)

That decision seems to be conclusive on the matter before us. The power given by the act of 1875 to the Court of Common Pleas to distribute these securities is as full in its language, and appears to be as great in its extent, as the power given to the Supreme Court

by the act of 1853. As it was held that the act of 1875 did not contemplate or authorize a transfer to a receiver who is even mentioned in the act, certainly the act of 1853 does not require any transfer, in its general application to the subject.

It is true that the act of 1853 gives the Supreme Court power to decree a distribution of these securities. That provision means a distribution to those who are entitled as policyholders or otherwise. There is no necessity whatever, in order to carry out such distribution, that the securities should be removed from the present lawful custodian. If the court could decree a distribution, in case the securities were in the hands of a receiver, they can decree the same distribution by the superintendent. All of the questions which are said to be intricate can be determined on the application of the superintendent, or of the parties interested, or in some proper form, as well if the securities remain where they are, as if they should be put in a receiver's hands.

We see no authority in the court to take the property out of the hands of the superintendent, who is the official trustee, except by decreeing a distribution. (See *Ruggles v. Chapman, ut supra.*) And it is evident that such a transfer as is asked for would be undesirable. It would burden those securities with the taxable fees and expenses of a receivership instead of leaving them in the management of a salaried officer of the State.

The orders granted should be reversed, with ten dollars costs and printing.

BOOKES, J. :

The decision by the Court of Appeals in the cases cited seems conclusive of the question here presented. I confess I should have readily, as it seems too readily, reached a different conclusion in the absence of the binding authority of those cases. It strikes me that the correct mode of working out an application of the funds to be obtained from the securities held by the superintendent to the use and benefit of those entitled to share them, would be through the receiver; and that to this end the latter, under proper safeguards, should have the custody of such securities with a view to their collection and the proper distribution of the avails. This mode of administering the assets for the benefit of those entitled to

them, appears to me the most simple, expeditious, and least expensive; and, for aught I can see, it would be, or could be made to be, entirely safe. But, under the binding authority of the decisions cited, the question is not open to discussion. The orders appealed from must be reversed.

Present — LEARNED, P. J., BOOKES and OSBORN, JJ.

Orders reversed, with ten dollars costs and printing disbursements.

JAMES H. VAN GELDER, APPELLANT, v. DANIEL H. VAN GELDER AND OTHERS, RESPONDENTS.

*Demurrer — costs at Special Term — costs upon appeal to General Term — Code of Civil Procedure, §§ 1347, 1349.*

Upon an appeal to the General Term from an order of the Special Term overruling or sustaining a demurrer to the whole or a portion of the pleading, the successful party is entitled to tax, as costs, twenty dollars before, and forty dollars for argument.

Where an order is made at the Special Term sustaining or overruling a demurrer to the whole or a portion of the pleading, the successful party is entitled to the full costs of the trial of an issue of law; and where relief is granted to the unsuccessful party, it should be only upon the payment of those costs; and to grant it upon payment of ten dollars costs only is improper.

*Hoffman v. Barry* (4 N. Y. S. C. [T. & C.], 253) limited.

MOTION to amend an order of the General Term.

At a General Term held at the city of Albany on the 23d of November, 1877, an order was made in this action affirming an order of the Special Term, "with ten dollars costs and disbursements." The order of the Special Term overruled a demurrer interposed by the plaintiff to the fourth defense set up in the answer.

This motion was made by the defendant to have the order of the General Term corrected by striking out the words "with ten dollars costs and disbursements," so as to allow full costs of the appeal.

*J. N. Fiero*, for the appellant.

*James B. Olney*, for the respondent D. H. Van Gelder.

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LEARNED, P. J. :

Section 307, subdivision 5, of the Code of Procedure fixes costs on appeals at twenty dollars before argument and forty dollars for argument. From this rate it excepts appeals to the Court of Appeals and appeals in cases mentioned in subdivisions 1, 3, 4 and 5 of section 349 and in the second paragraph of section 344. The present appeal was from an order overruling a demurrer. It was therefore brought under subdivision 2 of section 349, and is not excepted from the prescribed rate.

In reply it is urged that the repealing act (chapter 417, Laws of 1877, subdivision 4, section 1) has repealed section 349 of the Code, and that sections 1347 and 1349 of the Code of Civil Procedure have substantially taken its place; that subdivision 2 of section 1347 does not mention an order overruling or sustaining a demurrer. The commissioners say that an appeal from such an order is provided for in section 1349, as an interlocutory judgment. However that may be, we cannot apply the language and the exceptions of the section 307, subdivision 5, above referred to, to the sections of the Code of Civil Procedure above cited. If we cannot, since the repeal, refer at all to the old sections 349 and 344 for the meaning of section 307, then every appeal (except to the Court of Appeals) would carry the costs of section 307, subdivision 5. We think it more fair and simple to construe section 307, subdivision 5, as if it incorporated the description of appeals instead of designating them by reference to other sections; and we think therefore that the rule of costs in this respect is not altered by the changes of the last year. In this view it seems to us that on an appeal from an order overruling or sustaining a demurrer the successful party is entitled to tax twenty dollars before argument and forty dollars for argument. This is contrary to previous practice. But the matter has not before been called to our notice; and the change in the language of the Code has not been observed. The order of the last term must therefore be modified, as asked by the defendant.

The plaintiff asks a modification also that he may be allowed to withdraw his demurrer and to reply. He should be allowed to do so, on payment of the costs on overruling the demurrer at the Special Term, the costs of the appeal, including taxable disbursements

and ten dollars costs of motion, to be paid in ten days after service of a copy of the order.

BOOKES, J.:

I concur in the views expressed in the above opinion of my brother LEARNED, but it may be well to add an observation as to what the practice should now be at Special Term when relief is asked for and given to the unsuccessful party on demurrer. A remark on this subject is deemed necessary to avoid a misunderstanding of the decision (or a misapplication of it) in *Hoffman v. Barry* (4 N. Y. S. C. [T. & C.], 253). The 'overruling of a demurrer is, in legal effect, the ordering of judgment on the demurrer against the party demurring, and so an order sustaining a demurrer is a direction for judgment in favor of the party demurring. It is the better practice — indeed it is the true practice — to enter the order *in form* for judgment in favor of the prevailing party on the issue of law. The form of the order will, too, be the same whether the demurrer be interposed to an entire pleading or to one or more of several causes of action or defenses. The direction so given in form is now probably, under section 1349 of the Code, an interlocutory judgment. Such was the understanding of the codifiers. (See note to section 1349.) The successful party on a demurrer is then, in an action in which costs are given him by law, entitled to full costs, as given on the trial of an issue of law; and, inasmuch as costs are not in the discretion of the court, the right to those costs is absolute. And if relief be granted to the party against whom the interlocutory judgment is directed, it must be on payment of those costs. It follows, that to grant relief to such party on payment of ten dollars costs only, as upon a motion, is improper. My remarks in *Hoffman v. Barry* must stand explained or perhaps modified and corrected to meet the views here expressed. As regards the costs on an appeal from an order for judgment on demurrer, I agree with the conclusion of brother LEARNED, above given, in view of the present provisions of the Code.

In this case both parties have moved for an amendment of the order of the General Term, the defendant by striking out the limitation of costs on the appeal, and the plaintiff by adding a provision for relief against the decision of the court on the demurrer.

Both motions should be granted, as directed in the conclusion of the foregoing opinion.

Present — LEARNED, P. J., BOOKES and OSBORN, JJ.

Motion to correct order granted. Motion of plaintiff granted allowing him to reply on payment of the costs of the demurrer and costs of the appeal, and ten dollars costs of the motion, within ten days after service of a copy of this order.

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# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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EDGAR DAKIN, PLAINTIFF, *v.* THE LIVERPOOL AND  
LONDON AND GLOBE INSURANCE COMPANY,  
DEFENDANT.

*Proof of loss—on one of several policies in the same company on the same property, payable to the same person—when sufficient for all—Insurance of party “as interest may appear”—effect of—Loss payable to A B—entitles A B to recover the entire amount, though in excess of his individual loss.*

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff. This action was brought upon four policies of insurance issued by the defendant upon a tannery in Alpine, Schuyler county. The policies were all similar except as to dates, amounts and number of policy, and amounted in the aggregate to \$8,000. The insurance was to “S. D. Wood & T. W. Moore & Co., as interest may appear. \* \* \* Loss, if any, payable to Lyon & Dakin.” At the time of the issuing of the policies Lyon & Dakin held a mortgage for \$5,000 on the property, the whole of which subsequently passed to Dakin, who thereafter conveyed an interest therein to Wood, who already held a second mortgage for \$3,000 upon the property. T. W. Moore & Co. owned the tannery. After a loss had occurred proofs thereof were furnished under one policy, for \$2,500, it being stated therein “that in addition to the amount covered by said policy of said company, there was by the same company other insurance made thereon to the amount of \$5,500, as particularly specified in the accompanying schedule, marked ‘A,’ besides which there was no insurance thereon.”

The plaintiff in his complaint set out the issuing of all the poli-

cies but demanded judgment for \$3,134.40 the amount due to him on his mortgage. Upon the trial the court allowed the complaint to be amended so as to demand judgment for the full amount due on all the policies. The defendant urged, among others, the following exceptions :

First. That proofs of loss were furnished on but one of four policies, while the recovery was had on all.

Second. That the interest of the assured was that of a mortgagee only, and that it was not so expressed in the deed.

Third. That the court erred in allowing the plaintiff to amend his complaint so as to recover the whole amount of the insurance.

With reference to these points the court at General Term said :

"The proofs of loss were sufficient in law as to all four policies. They were identical, except as to dates and amounts. The four policies constitute essentially a single policy and were so treated by the proofs of loss. The defendant must be presumed to have knowledge of its own contracts. The proofs of loss were the same for each policy. If, therefore, the description of each policy had preceded the proofs of loss, it certainly would have been sufficient. How is it different when such description of the other three policies follows the proof of loss under the first policy, and gives notice that such proofs of loss apply equally to the other three. In any event the reception and retention of these proofs for nearly thirty days without objection on this point, the offer to pay a sum largely in excess of the amount insured by any one policy, and the other facts and circumstances leave no room to doubt that defendant waived and intended to waive any such objection, and that it was finally interposed as a technical, rather than a real, obstacle to this recovery.

The interest of the owners of the property and the interest of S. D. Wood, who was a mortgagee, were insured with the addition "as interest may appear." The defendant thereby undertook and agreed to insure any insurable interest those parties had. That was the language of the policies. The defendant took the premium knowing or having reason to know that these parties had some insurable interest in the property covered by the policy, and it would now be dishonest to allow the defendant to object that it did not know the nature and character of such interest, in order to avoid liability. (*Bidwell v. No. West. Ins. Co.*, 24 N. Y., 302.)

The plaintiff was allowed to amend his complaint so as to recover the whole amount insured by the four policies. In fact all of those policies were by their terms payable to plaintiff in case of loss. The plaintiff was, therefore, the proper person to collect the same. He may not be entitled to retain all that he collects, but that is of no importance to the defendant. Its duty is discharged when it has paid up according to its contract. The plaintiff will hold the funds collected in trust for those who may be entitled thereto, besides himself. The allowance of the amendment was in the discretion of the Court, and we do not think it erred in its exercise in this instance. It was an amendment in furtherance of justice and did not change the cause of action."

*M. M. Mead*, for the plaintiff. *Erastus P. Hart*, for the defendant.

Opinion by BOARDMAN, J.

Present — LEARNED, P. J., BOARDMAN and SAWYER, JJ.

Motion for new trial denied, and judgment ordered for plaintiff on verdict, with costs.

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MARY B. WILKINS, APPELLANT, v. HELEN BUCK AND OTHERS,  
RESPONDENTS.

*Reference — preliminary decision of referee, as to point submitted by consent — regularity of.*

APPEAL from an order made at the Special Term, denying a motion to set aside the judgment entered upon the report of a referee dismissing the complaint herein. Several irregularities were specified in the moving papers.

After considering several of these and holding that they were devoid of merit, the General Term said :

"The plaintiff insists that the report should be set aside because the referee dismissed the complaint on the merits.

This is perhaps rather a question of alleged error to be reviewed on appeal from the judgment. We have not before us the evi-

dence upon which the report was made. So far as appears by the affidavits, the referee's action in this respect was quite regular. The parties had mutually agreed that instead of the usual order of proof, the question as to the genuineness or forgery of two papers should be disposed of first. That is, the plaintiff having given *prima facie* evidence of the genuineness of the papers, both parties were to go on with their evidence on this point before they proceeded with the rest of the case. It would seem that question of the genuineness or the forgery of these two papers was important in the controversy. After the parties had gone through with such evidence as they chose to introduce on the question it was submitted to the referee. Subsequently he announced his conclusion on that question, and then appointed a day for the further hearing of the case. The defendants duly notified the plaintiff that the trial would be continued on that day and that they should move to dismiss the complaint on the merits. On that day the plaintiff failed to appear, and the referee dismissed the complaint on the merits. The case then was on trial. The referee had held that the two papers were forgeries on the evidence produced. The merits of the case had been partly tried and the plaintiff was at liberty to proceed with further evidence. It was not a mere failure of proof on the part of the plaintiff because the defendants had themselves given evidence. The papers before us do not show what the evidence was on either side. \* \* \* The conclusion to which he came as to the two papers was substantially an exclusion of certain evidence offered by the plaintiff. The cause was still open for the production of further evidence if either party desired. The order should be affirmed, with costs."

*H. O. Southworth*, for the appellant. *Richard L. Hand*, for the respondents.

Opinion *per Curiam*.

Present — LEARNED, P. J., BOCKES and OSBORNE, JJ.

Order affirmed, with ten dollars costs and disbursements.

PAMELIA A. MARSH, APPELLANT, v. HARRY S. HOUSE  
AND OTHERS, RESPONDENTS.

*Usury* — action by devisee of mortgagor, to set aside a mortgage on the ground of —  
plaintiff must first offer to pay the amount loaned to his ancestor.

APPEAL from a judgment entered on the report of a referee dismissing the complaint.

This action was brought to set aside a deed of certain premises executed by one Joseph F. Wiley and the plaintiff, his wife, to Benjamin Raymond, now deceased, on the ground that the deed was given to secure the payment of money loaned by Raymond to Wiley at a usurious rate of interest, to wit, twelve per cent.

The plaintiff, appellant, claims in the complaint a life estate in the use, rents and revenues of the lands, as devisee of the same under Wiley's will, and also claims to be the executrix named in his will, and alleges that the remainder-men, except one, conveyed to her, all their interest in the real and personal property of Joseph F. Wiley, in his lifetime. The complaint does not allege repayment of the amount received by Wiley of Benjamin Raymond, or contain an offer to repay, nor was any such repayment or offer proved upon the trial. The defendants moved to dismiss the complaint on the ground that it did not state facts sufficient to constitute a cause of action and the motion was granted, and from the judgment entered thereon this appeal was taken. The court at General Term said :

"The other action is brought in equity to set aside a conveyance, absolute on its face, not alleged to be in fact a mortgage, on the ground of usury. It was a well-known rule that when a party came into equity to set aside an instrument on the ground of usury, he was required to do equity by offering to pay what he had borrowed, with legal interest. This, of course, did not prevent a party from making a defense at law without any such terms. The rule has been modified by statute in behalf of the borrower (Laws 1837, chap. 430), and the borrower is not now required to pay, or to offer to pay, the money borrowed. But this statute modification extends only to the borrower. (*Wheelock v. Lee*, 64 N. Y., 246.) Other persons must still do equity if they would have equity. Mrs. Marsh was not a



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borrower. She never owed the money. She is the devisee of Wiley, who, as she claims, borrowed the money. She cannot, therefore, maintain the action in equity without offering to refund what was received."

*Ralph Swinburne*, for the appellant. *Taylor & Kilburn*, for the respondents House and King, as executors, etc.

*Albert Hobbs*, for the respondents Raymond and Flanders. *W. P. Cantwell*, for the respondents W. W. and H. E. King.

Opinion *per Curiam*.

Present — LEARNED, P. J., BOOKES and OSBORN, JJ.

Judgment affirmed, with costs.

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JAMES H. SMITH, RESPONDENT, v. DAVID WALDORF,  
APPELLANT.

*Animals trespassing on lands of person, other than their owner — rights of owner of land to drive them off with dogs.*

APPEAL from a judgment of the Otsego County Court, affirming a judgment of a justice of the peace in favor of plaintiff for fifty dollars damages and costs.

The plaintiff in his complaint claimed to recover the value of a cow, which he alleged was killed by the wrongful and illegal acts of the plaintiff.

This cow had been trespassing on the plaintiff's lands. The plaintiff found the cow lying injured a few feet from the fence separating the lands of the parties, but on his, plaintiff's, side of the fence. She was badly injured, and in a few days thereafter died. The testimony showed that this injury was occasioned in the attempt made by the cow to jump over the division fence in a bad place, and in falling in the place where she was found by the plaintiff. There were no marks upon her indicating that she was bitten or injured by a dog. There were no marks to indicate any bite whatever, and the only evidence there was to warrant a recovery was that the defendant, finding this cow with two or three other animals belonging to plaintiff trespassing upon his lands, set his dog after

them. There was no pretense that the dog did any thing more than to run after and bark at them. In her fright this cow jumped over the fence at a somewhat dangerous point, and received in consequence thereof these injuries. The other animals escaped in another direction and were unharmed.

The court at General Term said: "It seems to us entirely clear that there was no evidence in the case to warrant a recovery for the value of the cow; indeed, no evidence to warrant its submission to the jury in the Justice's Court. The justice should have granted the motion to strike out all the evidence in reference to this cow, and his refusal to do so is error. There was no evidence that the defendant did any thing which he could not legally do in removing from his premises a trespassing animal. To accomplish this object he had the right to call to his aid a dog, as he did in this case. If the owner of the land should urge on to a trespassing animal an ugly and vicious dog, which should unreasonably and unnecessarily bite and lacerate such animal, he might be liable; but that is not this case. There is no evidence that the dog touched the cow at all. Indeed, the positive evidence is that the dog was, at all times, at a considerable distance from the animal. (Sherman & Redfield on Negligence, § 200; 1 Hilliard on Torts, 145; 1 Addison on Torts, 480.)

The injury to this cow was clearly the result of an accident and not of any unlawful or negligent act of the defendant. He is no more liable than if the cow had fallen into a pit while trespassing on his lands; or, as in the case of *Bush v. Brainard*, had drunk maple syrup and died, which defendant had negligently left in an open place. (1 Cow., 78.)"

*Countryman & Bowen*, for the appellant. *Lynes & Van Horn*, for the respondent.

Opinion by OSBORN, J.; LEARNED, P. J., and BOOKES, J., concurred.

Judgment reversed, with costs.

ELLEN DE GRAFF, APPELLANT, v. JOHN CARMICHAEL, AS  
EXECUTOR, ETC., OF CALVIN FORBES, DECEASED, RESPONDENT.

*The right to close the case.*

APPEAL from a judgment in favor of the defendant entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried. This action was brought upon a \$3,000 note made to plaintiff by defendant's testator. The answer alleged three defenses: First. A want of consideration. Second. The short statute of limitations. Third. Unsoundness of mind of the testator at the time of signing the note. At the Circuit a verdict was rendered for the defendant. The plaintiff insisted that the court erred in refusing to allow plaintiff's counsel to make the closing address to the jury..

The court at General Term said: "As to the third point raised by the appellant it is only necessary to inspect the pleadings to determine this question, and it can only be determined by so doing. The action was upon a note. Its execution was not denied. There was nothing in the first instance for the plaintiff to prove. When the trial was ready to proceed it seems no suggestion was made as to which party had the affirmative. The plaintiff's counsel stated his case and presented the note, and upon its appearing to be mutilated called the witness to identify it and to explain how it came in that condition. But this was in reference to no issue raised by the pleadings. When the evidence was closed the question arose for the first as to who had the right to make the closing address to the jury, and the learned justice very properly held that the defendant's counsel had that right. Certainly this was so according to the pleadings, nor do I see that any thing had taken place upon the trial by which the defendant had waived such right. A different ruling would have been erroneous and would have entitled the defendant to a reversal, in the event that the verdict had been in the plaintiff's favor. (*Miller v. Thorn*, 56 N. Y., 405; *Elwell v. Chamberlain*, 31 id., 614.)"

*S. W. Jackson*, for the appellant. *F. Fish*, for the respondent.

Opinion by OSBORN, J. LEARNED, P. J., and BOOKES, J., concurred.

Judgment and order affirmed, with costs.

**Cases**  
DETERMINED IN THE  
**FOURTH DEPARTMENT**  
AT  
GENERAL TERM,  
January, 1878.

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CATHARINE OUTHOUSE, RESPONDENT, *v.* ORRIN OUTHOUSE, APPELLANT.

*Destruction by its maker of an outlawed note — measure of damages for — Presumption as to pleading the statute of limitations.*

This action was brought by the plaintiff against her brother, for the conversion of a note given to her for money borrowed by him. After the lapse of more than six years from the maturity of the note, he asked her to let him see it, promising to return it. Having obtained possession of it, he threw it in the stove and burned it up. The justice at the Circuit charged, with reference to the amount of damages, that the plaintiff was entitled to recover the face of the note with interest; that, though outlawed, it constituted a moral obligation sufficient to uphold a new note or promise; that, although the defendant could have pleaded the statute of limitations in an action upon the note, yet being a wrong-doer, he was entitled to no presumptions in his favor.

*Held*, that the charge was correct.

APPEAL from a judgment in favor of the plaintiff entered upon the verdict of a jury, and from an order denying a motion for a new trial made at Special Term.

*H. L. Comstock*, for the appellant. The judge erred in charging the jury, in substance, that if the plaintiff's testimony was true she was entitled "to recover the full amount of the note, principal and

interest, from the time it was given to her by her brother," and the exception to such charge is well taken. (*Romig v. Romig*, Rawle, 241; *Lowremore v. Berry*, 19 Ala., 130; *O'Donohue v. Corby*, 22 Mo., 393; *Bredow v. Mut. Sav. Inst.*, 28 id., 181; *Rose v. Lewis*, 10 Mich., 483; *Latham v. Brown*, 16 Iowa, 118; *Ingalls v. Lord*, 1 Cow., 240; *Mathew v. Sherwell*, 2 Taunt., 439; *King v. Ham*, 6 Allen, 523; *M'Leod v. M'Ghie*, Man. & G., 326; *Mercer v. Jones*, 3 Campb., 477; *Menkins v. Menkins*, 23 Mo., 252; *Craig v. McHenry*, 35 Penn. St., 120; *Mininger v. Banning*, 7 Minn., 274; *Fell v. McHenry*, 42 Penn. St., 41; Sedg. on Damages [5th ed.], 563; *Robbins v. Packard*, 31 Vt., 570; *Stephenson v. Thayer*, 63 Me., 143; *Booth v. Powers*, 56 N. Y., 22.)

*Metcalf & Field*, for the respondent. In actions brought for conversion of promissory notes, chose in actions, etc., the rule seems to be well settled that the measure of damages is *prima facie* the face of the note; and that is so, even when there is no wrongful or illegal act connected with the conversion. Practically there can be no other rule of damages. (See Sedg. on Damages [6th ed.], 488, 495; *Potter v. Merchants' Bk.*, 28 N. Y., 641; *Decker v. Mathews*, 2 Kern., 313; *Rose v. Lewis*, 10 Mich., 483; *Parry v. Frame*, 2 Bos. & Pull., 451; *Clowes v. Hawly*, 12 Johns., 484; see, also, *King v. Ham*, 6 Allen, 298; Mayne on Damages, 294, 295; *M'Leod v. M'Ghie*, 2 Mann. & G. Reps., 326.)

TALCOTT, J.:

This is an appeal from a judgment entered on a verdict at the Ontario Circuit. The parties are brother and sister. The jury must be held to have found, under the charge of the court, that the plaintiff held a note against the defendant for \$175, given to her for money borrowed by him; that more than six years from the time the note became payable had elapsed, and that after that time, and in the year 1874, the defendant requested the plaintiff to show him the note, and she did so on his promise to return the same to the plaintiff after he had looked at it, and thereupon he put the note in the stove and burned it up, without the consent of the plaintiff, and against her will.

The only question of law in the case arises upon the rule laid

down by the judge as to the measure of damages. He charged the jury, in effect, that if they found a verdict for the plaintiff, she was entitled to recover the full face of the note, with interest; that notwithstanding the note was outlawed, it constituted a moral obligation sufficient to form a good consideration for a new note or new promise; that if the defendant should choose to set up the statute of limitations in a suit on the note, the defense would prevail, but that the defendant, being a wrong-doer, was entitled to no presumptions in his favor. It is true that the general rule in an action for the conversion of a note of a third party is, that the damages are to be measured by the amount apparently due upon the note, but it may be shown that by reason of part payment, or the insolvency of the party obligated to pay the note, or by reason of the existence of some legal defense to the note, the plaintiff has not, in fact, sustained damages to the extent of the face of the note by reason of its conversion. (*Booth v. Powers*, 56 N. Y., 22.) It is, however, held that where the maker of the note has converted it, in an action brought against him for such conversion, he cannot set up his own insolvency by way of mitigating the damages. The statute of limitations is a good defense if specially pleaded. If not specially pleaded it does not defeat an action on the obligation. The question is, whether it is to be presumed that the defendant would set up that defense to this obligation in behalf of his sister, as was conceded, for borrowed money and no part of which had been paid. Could such a presumption be indulged as being the course likely to be pursued by a man under such circumstances, where the outlawry of the note was occasioned by the indulgence of his sister?

But could such a presumption be indulged in favor of this defendant? He was a wrong-doer, a willful trespasser and spoliator, and is not only deprived of all presumptions in his favor, but all presumptions are against him according to the maxim, "*Omnia presumuntur contra spoliatorem.*" It was upon this ground that the judge at the Circuit put his ruling on the question of the measure of damages, and we think it was a proper application of the rule.

Judgment affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment and order affirmed.

## MILTON EDMONSTON, APPELLANT, v. RUTH ANN EDMONSTON, RESPONDENT.

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*Estoppel*-- must be certain—effect of, when part of description of real property—it does not apply to collateral actions—Declaration of person in possession of land—when admissible.

In 1832 E. Edmonston died, being then in possession, as was claimed, of a farm of 100 acres, leaving him surviving his widow and seven children, who continued in possession of the farm until 1844, when, by agreement, the east half was conveyed to the heirs in fee, and the west half to the widow, but whether in fee or for life was in dispute. The widow died in 1869, leaving a will by which she devised all her estate to her daughter, the defendant herein. Upon the trial of this action, brought by one of the children against the daughter, to recover his share of the west half, the daughter claimed that the west half belonged to the mother in fee, by gift from her brother, who was a tenant in common of the farm with her father, and that during the lifetime of the latter he had set apart the west half of the lot to the mother.

In the deeds of the east half, made in 1844, the lots were described as "being lot No. —, in the subdivision of the east half of the farm of Elijah Edmonston, late of Phelps aforesaid, deceased, *owned and occupied at his death.*" The plaintiff claimed that the widow, by executing deeds containing the words in italics, was estopped from denying that the whole lot belonged to her husband at the time of his death.

*Held*, that the words were too indefinite and uncertain to constitute an estoppel, as they might be construed as meaning that the east half only belonged to the husband.

That as the words in question were part of a description of premises, already sufficiently described, no estoppel was created by them.

That even if they did constitute an estoppel, it was limited to questions arising on the deed itself, and would not apply to a collateral action, such as the present one, not founded upon the deed.

That the declarations of the widow as to her title were admissible, as tending to characterize her possession, and to show that it was claimed under a title adverse to that of the heirs of Elijah Edmonston.

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury.

Wm. F. Cogswell, for the appellant.

J. C. Cochrane, for the respondent.

TALCOTT, J. :

This is an appeal from a judgment rendered on a verdict, after a trial at the Ontario Circuit, in an action of ejectment, in which a general verdict was rendered for the defendant.

The parties are two of the heirs at law of Elijah Edmonston, deceased, who died in 1832, as was claimed, in possession of a certain 100 acres in the town of Phelps. He left him surviving his widow, Elizabeth Edmonston, and seven children. The widow and children continued to live on the 100 acres until some time in the year 1844, when an arrangement was made between them by which the east half of the farm was conveyed by the widow to the heirs in fee, and the west half was set off to the widow, but whether in fee or not was one of the matters in dispute on the trial, the conveyance to the widow not being produced and having apparently been lost or destroyed, without being placed on record. The widow died in 1869, leaving a will by which she devised all her real and personal estate to the defendant, her daughter, who resided with her until her death and remained in possession of the east half of the 100 acres. This action was commenced in 1870, and has been once tried before the late SAMUEL SELDEN, as a referee, who reported in favor of the defendant, and the plaintiff took a new trial under the statute, as of course, on payment of costs.

It appeared that the 100 acres were conveyed to Elijah Edmonston and one Robert Orme, as tenants in common. Edmonston and Orme came from the State of Maryland, and purchased the land in 1807. They were brothers-in-law, Mrs. Elizabeth Edmonston being the sister of Orme. Edmonston and Orme appear to have occupied the land in common, until Orme, finding the climate did not agree with him, left this part of the country and returned to Maryland, and so far as appears, wholly abandoned his claim to the 100 acres. He died in the year 1827, never having been married, leaving the said Elizabeth Edmonston as one of his heirs at law.

There was evidence in the case tending to prove that Mrs. Edmonston claimed that her brother, Robert Orme, as he was about to leave this section of the country and return to Maryland, made a parol gift of his interest in the 100 acres to her, and there was evidence tending to show that Elijah Edmonston, in his lifetime, recognized the right of his wife to one-half the farm of 100 acres,



and also tending to show that a division had been made of the 100 acres between Edmonston and his wife, and that to her was assigned the west half of the 100 acres. The house in which the widow and children lived until about the year 1844, when the settlement took place between them, whereby she conveyed the east half of the farm to the heirs, and retained the west half herself, was situated on the west half, and she continued to live there till her death.

The point first presented by the appellant's counsel is, that the law will presume a grant from Orme to Edmonston by reason of the long possession of the latter. It does not become important to examine this position in this case, because we do not see that the question was anywhere raised upon the trial, either by a request to the court to so instruct the jury or otherwise, and this being an appeal from the judgment, we have nothing to do with any thing but questions of law raised upon exceptions. (*Boos v. The World M. Life Ins. Co.*, 64 N. Y., 236.) The same answer applies to another proposition of the counsel for the plaintiff, to wit, that the defendant acquired no advantage by her deeds from the heirs of Orme, as, being a tenant in common with the other heirs of her father, her deed inured to their benefit.

The appellant's counsel then claims, that the recital in the deeds between the heirs of Edmonston, that the 100 acres was *owned and occupied* by Elijah Edmonston, estops the defendant from claiming the same. The only exception taken by the plaintiff in respect to the charge, is to the refusal of the court to charge, as requested, in the following language: "That the transaction which occurred in 1844, the agreement and execution of these papers to the defendant, created an estoppel which prevents the defendant from setting up title." The court refused so to charge and the plaintiff's counsel excepted. The estoppel is now claimed to arise out of certain language used in the various deeds of subdivision of the east half of the 100 acres, all which were executed by Elizabeth Edmonston, and all, except the deed to herself, by the defendant, conveying to each of the heirs the portion of the east half of the said 100 acres which had been by an agreed partition set off to each of the heirs respectively. The language is a part of the description of the premises, and, taking the deed to the plaintiffs as an illustration, is as follows: "Being lot No. 4 in the subdivision of the east half of the farm of

Elijah Edmonston, late of Phelps, aforesaid, deceased, owned and occupied at his death."

Estoppels are not favored in the law, for where they exist they prevent evidence of the truth being given; wherefore, in order to constitute an estoppel, it should appear very clearly that the party sought to be estopped, deliberately made an affirmation or recital of the fact in question, and there should be no question but that he meant to state or recite, as a fact, that which he now seeks to contradict; and it is to be observed that the supposed estoppel in this case is in no wise certain; and it might be a question of doubt whether the words "owned and occupied at his death," referred to any thing more than the east half of the farm. The expression does not seem to be of that degree of certainty required in estoppels by deed; but of doubtful import, and such as might, at all events, be understood by the party executing the deed, to do no more than recognize the fact that Elijah Edmonston, at his death, *owned* and occupied the east half of the 100 acres in question. It will be perceived, also, that the recital by which it is claimed that the defendant is estopped is introduced into the deed as a part of the description of the premises, sufficiently described before, as being outer lot No. 4, in the subdivision of the east half of the farm of Elijah Edmonston. It is doubtful whether the principle of estoppel applies to matter of description.

In *Doane v. Willcutt* (16 Gray, 360) a party to an indenture of partition containing a full and accurate description of the land and a recital that it had been set off to a widow, was held not to be thereby estopped, to show that land held by him under a lease from the widow, of all the premises set off to her as dower, was not, in fact, though so recited, embraced in the dower lands. And in that case, MERRICK, J., delivering the opinion of the court, says: "This recital, however, is plainly only a part of the *description* of the estate upon which the deed was intended to operate, which is therein otherwise fully and accurately described. The doctrine of estoppel is not applicable to such a case. Where several particulars are mentioned and referred to in the description of the land conveyed, some of which are found to be erroneous, these may be rejected as a false demonstration, and the other parts of the description which are unambiguous and correct may be relied on to fix

and determine the rights of the parties under the deed." And the record of the assignment of dower was held to have been properly given in evidence, though it contradicted the recital, and the party claimed to be estopped by the recital was permitted to set up a title by adverse possession. So, too, an estoppel is limited to questions arising on the deed itself, and does not operate collaterally. (Bigelow on Estoppel, 286; Herman on Estoppel, 238.)

In *Carpenter v. Buller* (8 Mees. & W., 209) the court says: "But there is no authority to show that a party to an instrument would be estopped in an action by the other party, not founded on the deed and wholly collateral to it, to dispute the facts so admitted, though the recital would certainly be evidence." It was on the latter ground, as we understand from the opinion of Judge SELDEN, as referee on the former trial of this case, that he held the defendant not to be estopped.

The counsel for the appellant also insists that the admission of the declarations of Mrs. Elizabeth Edmonston, made to various witnesses and on various occasions as to her title, were clearly erroneous. Those declarations were inadmissible for the purpose of establishing such title, but the only objection made was to the admissibility of the testimony. The declarations of Mrs. Edmonston while in possession, on the subject of whether she claimed title and what title, were, we think, admissible in evidence to characterize the possession, as whether it was claimed under a title adverse to that of the heirs of Elijah Edmonston; and specifying what title she did claim under, was one mode of showing that she claimed under an adverse title. (*Jackson v. Vredenburg*, 1 Johns., 159; *Jackson v. Vandusen*, 5 id., 144.) In the case last cited, VAN NESS, J., delivering the opinion of the court, says: "It is every day's practice to admit the declarations of the person in possession, to show under whom and by virtue of what title he holds. That such evidence is proper has been so repeatedly decided by this court, that I supposed the point was completely at rest."

The plaintiff offered in evidence what purported to be a copy of the will of Orme, that is, the original will and proofs were probably lost, and the copy offered was a copy of what purported to be a copy of said will, as engrossed on the records of the County Court of Jefferson county, West Virginia. The will purported to have

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been made in 1827, and purported to have been signed by Robert Orme, by his mark. If genuine, the will purported to devise to Malvina Dooley, all the land to which the testator was entitled in the county of Ontario, State of New York. The evidence was rejected by the court. It is probably enough to say of this offer, that it was wholly immaterial, as the will did not purport to convey any title to the plaintiff, and he did not propose, in any manner to connect his title with the devisee named in the will.

Thus, having considered all the reasons presented by the appellant's counsel for a reversal of the judgment, we conclude that they are insufficient, and whatever might have been the effect of the charge of the judge, or the omission to instruct the jury as to the legal position of the parties, we do not find that any exception was taken to the charge, save only that touching the alleged estoppel, in regard to which we think the learned judge was correct.

Judgment affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
ADAM AINSLEE v. ALFRED A. HOWLETT AND OTHERS.

*Summary proceedings—what defense may be set up by tenant—That lease was in fact a mortgage—that it was void for usury—how proved.*

In summary proceedings instituted to remove the relator from certain premises, on the ground that he was holding over after the expiration of his term, he made an affidavit stating that on the day on which the respondent alleged that the lease was made he executed and delivered to the respondent an absolute deed of the premises, and he and the respondent executed an agreement by which he agreed to buy the premises for a price therein named, to be paid on the day the lease expired, and also executed the lease upon which the proceedings were instituted; that said instruments were all given at the same time to secure the repayment of a sum of money loaned to him by the respondent, and were in fact a mortgage; that upon the said loan usurious interest was reserved, the payment of which was secured by the said lease.

*Held*, that it was competent for the relator to establish in such proceedings, that the instrument purporting to create the relation of landlord and tenant between himself and the respondent was in fact a mortgage to secure the repayment of a loan.

That it was also competent to show that such instrument was given to secure a usurious loan, and was therefore void.

That the establishment of either of these facts would require the proceedings to be decided in his favor.

*Semble*, that in summary proceedings it would not be competent to establish by parol evidence, that a deed absolute upon its face was intended as a mortgage.

Where, however, the affidavit does not specify the kind of evidence by which it is expected to establish this fact, it must be presumed that it will be proved by competent evidence.

CERTIORARI to review proceedings instituted before the county judge of Onondaga county, under the landlord and tenant act, to remove the relator from certain premises on the ground that he was holding over after the expiration of his term.

*Fuller & Vann*, for the relator.

*D. Pratt*, for the respondent.

TALCOTT, J. :

This is a writ of *certiorari*, under the landlord and tenant act, to remove proceedings had under that act before the county judge of Onondaga county. By the return it appears that the affidavit of the respondent, who claimed to be the landlord of the relator, was in due form, and that the county judge issued his summons, which was duly served on the relator, who appeared before the county judge on the return thereof.

The affidavit of the respondent on which the county judge issued the summons stated that on the 15th of May, 1876, the respondents let unto the said Adam Ainslee certain premises therein described, consisting of a farm in the town of Dewitt, from May 15, 1876, to the 1st day of April, 1877; that the said term has expired and that said Ainslee holds over and continues in the possession of the premises without the permission of the respondents, his landlords. At the return of the summons the relator Ainslee appeared and inter-

posed his affidavit to the effect that on the 15th of May, 1876, in order to secure a loan then made to him by the respondents he executed and delivered to them a certain instrument in writing, of which a copy is annexed (and which, upon examination, appears to be in form an absolute deed from Ainslee and wife, to the respondents, of the premises in question with covenant of warranty), and that the respondents at the same time executed and delivered to him, Ainslee, under their hands and seals, a written instrument, a copy of which is also set forth as Exhibit B, and at the same time the respondents executed and delivered to him a certain other instrument, also set forth as Exhibit C. The said instrument set forth as Exhibit B appears to be an executory contract made by the respondents of the first part and said Ainslee of the second part to sell and convey to said Ainslee in fee simple, with covenants of warranty, the same premises, and contains a covenant on the part of Ainslee to purchase the same, and pay, and secure to be paid, therefor on or before the 1st day of April, 1877, the sum of \$16,600, with a further covenant on the part of Ainslee "that in case the said party of the second part has possession of said premises before the execution and delivery of said deed, and in case of his failure to perform any of the covenants herein contained, he will quietly yield up and deliver peaceable possession of said premises that the party of the first part may, immediately after such failure, re-enter and take possession of the same without any previous notice to quit in reference to any legal proceedings to recover possession thereof."

Exhibit C, referred to in said affidavit, purports to be a lease of the same premises from the respondents of the first part to said Ainslee of the second part, from the day of the date of the lease, 15th day of May, 1876, to the 1st day of April, 1877, at the rent of \$1,209.82, to be paid at the expiration of the said term, and containing a covenant on the part of Ainslee to pay said rent and to pay the taxes assessed on the premises during the term, and contains the usual clause of re-entry and a covenant on the part of Ainslee to quietly yield the possession of the premises at the expiration of the term.

The affidavit of Ainslee, after setting forth these papers, proceeds to say that the deponent denies each and every allegation and statement in the affidavit of the respondents on which the summons was

issued, not hereinbefore specifically admitted. The admission is, therefore, of the execution of the said papers. The affidavit then proceeds to state that all of said instruments A, B and C, were part of one and the same transaction, and all were simply designed as security for a loan from the respondents to Ainslee. That in the month of May, 1876, Ainslee, being in need, applied to the respondents for a loan of \$5,600; that they agreed to make the loan until April 1, 1877, and that Ainslee agreed to pay them the sum of \$500 over and above the lawful interest for the use and forbearance of said sum from the 15th day of May, 1876, to the 1st day of April, 1877; and that the said instruments A, B and C were executed as security for said usurious loan; that it was agreed between them that the \$500 excess of interest should be taken in the name of and under cover of rent; and that said instruments A, B and C, and particularly the lease, were executed and delivered to conceal the usury in said loan; and that said Ainslee has been in the constant possession of the premises described in the affidavit on which the summons was issued, for about forty-six years last past, and that the respondents never have been in possession of the same, or any part thereof; that the deed and lease were collateral to the loan of the money, and were simply a mortgage in fact, and were so intended by the parties thereto. The affidavit of Ainslee also contains certain further particulars and allegations unnecessary on this occasion to refer to. The county judge held that the affidavit of Ainslee did not show any cause to the contrary, and thereupon issued his warrant of possession, as in case of no cause being shown by the tenant.

The first question which arises on this return is, whether the fact that the instruments, namely, the conveyance from Ainslee and wife, the contract of sale and the lease, may be shown to be, in fact, a mortgage as security for a loan, and then that the actual relation of landlord and tenant did not exist between the parties; and for this purpose the allegations of Ainslee's affidavit must be taken as true. The effect of that affidavit, taken all together, is that the three papers referred to, instead of being actually intended to be what they purport to be on their face, were, in fact, intended as security for a loan in the nature of a mortgage; presenting the precise case presented in *Roach v. Cosine* (9 Wend., 227), where the

alleged tenant was permitted to show by parol that a similar arrangement under which he held possession of the premises was, in fact, only intended as security for a loan. The case of *Roach v. Cosine* came up on *certiorari* to remove summary proceedings under the landlord and tenant act, and in that case, although the jury had found a verdict for the landlord, the proceedings were reversed. The court, SAVAGE, J., saying: "If, in this case, the sale was absolute, and Roach was to remain in, free of rent or at a nominal rent, for two years, and continue to hold afterwards without any new agreement, he was a tenant at sufferance; but if the conveyance, though absolute in its terms, was in reality a mortgage, and so intended by the parties, then Roach remained the owner, notwithstanding the agreement that Cosine should receive the rent. \* \* \* I need not cite cases to establish the proposition that this conveyance, though absolute in its terms, was only a mortgage; as such it is to be treated, and Cosine has no remedy to enforce it, which he would not have had, had it been a mortgage in form. It cannot be contended that the statute under which these proceedings were had, was intended to afford an expeditious mode of foreclosing a mortgage."

In one respect, and in one only, the case of *Roach v. Cosine* may be considered to have been overruled; that is in reference to proving by parol at law, that an absolute deed was intended only as a mortgage, for it was subsequently held by the Court of Errors, in *Webb v. Rice* (6 Hill, 219), that parol evidence is not admissible in a court of law, to show that a deed absolute in form was intended as a mortgage, and it may be doubtful, therefore, whether in these summary proceedings, parol evidence could be resorted to for that purpose. Since the Code, it is held, that inasmuch as it provides that the defendant may set up any defense in an action, whether such defense was theretofore a legal or equitable defense, that the same rule of evidence that prevails in equity, in regard to showing that a deed absolute in form was intended as a mortgage, also prevails in regard to such defenses. (*Crary v. Goodman*, 12 N. Y., 266; *Despard v. Walbridge*, 15 id., 374.) But these summary proceedings under the landlord and tenant act, are expressly exempted from the operation of the Code of Procedure, by section 471. (See *Benjamin v. Benjamin*, 5 N. Y., 383.) It may be doubtful, therefore, to say the least whether, in the summary proceedings,



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parol evidence can now be given to turn an absolute deed into a mortgage, but it is to be observed that the affidavit of Ainslee does not specify the kind of evidence by which he expects to show the facts which he avers, and the presumption must be that they can be shown by some evidence which is competent for this purpose.

Again, the affidavit denies all allegations contained in the affidavit on which the summons was issued, except the fact of the execution of the deed, the contract for the conveyance and the lease; and he alleges, that although the lease was in form executed, still it was intended to secure a usurious rate of interest, which was to be secured in the lease under the name and cover of rent. He, in substance, denies that he holds of the respondents, except by virtue of the execution of this usurious lease; he alleges that the respondents are not his landlords, and that though such a paper is in existence, purporting to have been duly executed, it is void for usury. There is no rule of law or equity which prevents usury or a usurious device being shown by parol, and if it be true that the lease is a usurious device, it is void at law. The parties to it are not bound and we do not see how the supposed landlords are to maintain these proceedings, if it be true that the supposed relation of landlord and tenant is created only by an instrument which is void as against the supposed tenant. The conventional relation of landlord and tenant does not exist between the parties in such a case, and the facts averred in the answer amount to a denial of the existence of the relation. We think the county judge erred in holding that there was nothing in the affidavit of the relator which traversed the affidavits of the respondents, and that he should have summoned a jury in pursuance of the statute. As a consequence, the proceedings before the county judge must be reversed, and as in this case the county judge has issued a warrant of possession in behalf of the respondents, it is a case requiring restitution under the statute.

Proceedings before county judge reversed, and restitution of the premises described in the warrant of possession ordered, with costs to the relator.

MULLIN, P. J., concurs in result; SMITH, J., does not vote.

Ordered accordingly.

WILLIAM R. McNAIR, ASSIGNEE, ETC., RESPONDENT, v. THE  
NATIONAL LIFE INSURANCE COMPANY OF THE  
UNITED STATES OF AMERICA, APPELLANT.

*Action upon a policy of insurance—Declaration by doctor as to cause of death—admissibility of.*

This action was brought to recover upon a policy of insurance, issued by the defendant upon the life of the son of the plaintiff's assignor, for her benefit. In the application for insurance, signed by the son and plaintiff's assignor, in answer to a question as to the cause of his father's death, he stated "don't know." Upon the trial it was claimed by the defendant that the father died of consumption and that this fact was known to the plaintiff's assignor. Upon the examination of the plaintiff's assignor she was questioned as to the disease by which her husband died, and answered: "The doctors called it torpor of the liver and disease of the stomach and heart." It appeared that both of the physicians who had attended the husband were dead at the time of the trial. The defendant claimed that the evidence as to the statements of the doctors was inadmissible, as being mere hearsay.

*Held*, that the evidence was admissible as bearing upon the question of fact, whether or not the witness knew the disease with which her husband was afflicted and of which he died.

That the declaration was also admissible, as having been made by the doctors in the ordinary discharge of their professional duties.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee. The plaintiff sues as the assignee for the benefit of the creditors of Chauncey W. Gibson, the assignee of Mary Marsh, the party for whose benefit the policy of insurance, to recover on which this action was brought, was issued on the life of her son Charles H. Marsh.

*James Wood*, for the appellant.

*E. A. Nash*, for the respondent.

TALCOTT, J.:

This is an appeal from a judgment entered on the report of a referee in favor of the plaintiff.

The action is upon a policy of life insurance, issued in April, 1869, to Mary Marsh, of Avon, Livingston county, insuring the life

of her son, Charles H. Marsh, of the same place, for the sum of \$5,000. The appellant calls our attention to but one exception to the referee's ruling as to the admission of evidence, which arose as follows: The application for the policy was signed by Charles H. Marsh, the person whose life was insured, and by the assured, Mary Marsh. Among other questions and answers contained in that application, the applicant was asked the cause of his father's death, to which he had answered, "Don't know." On the examination of Mrs. Mary Marsh, as a witness in the cause, it appeared that the husband had employed, at different times, two regular medical attendants, Dr. Salisbury, who attended him when ill until he (the doctor) died, and afterward Dr. Caton, who continued to attend Mrs. Marsh's husband until his (the husband's) decease. It was claimed on the part of the defendant, and evidence had been given tending to establish the fact, that Charles Marsh, the husband of Mary Marsh, and the father of Charles Henry Marsh, who signed the application in behalf of his mother, had died from pulmonary consumption in or about the year 1859, and that Charles Henry was about at home when his father died, and that Mrs. Mary Marsh, the assured, was in attendance upon her husband previous to and at his death. And among other things, the counsel for the defendant had asked one Dr. Nesbitt, who testified that he had been called in consultation previous to the death of Charles Marsh, the following question, "Was it understood and stated in the family with what disease Charles Marsh was afflicted?" To this question the counsel for the plaintiff objected. The objection was, however, overruled by the referee, and the witness answered, "It was said in the presence of the whole family, again and again, that the disease was consumption."

On the examination of Mrs. Marsh after she had detailed some of the symptoms of her husband's disease, she was asked of what disease her husband died; to which she answered, "The doctors called it torpor of the liver, and disease of the stomach and heart." The counsel for the defendant then objected to the witness testifying to the declaration of physicians as incompetent. The objection was overruled, and the defendant excepted. Other testimony of the same character was taken under exception; the ground of the objection being, as stated in the case, that "such proof must be

made by the physicians themselves." Mrs. Marsh had stated that Drs. Salisbury and Caton were the physicians of her husband, and seemed to be ignorant that Dr. Nesbitt had ever been called to visit him ; and it had been shown that both Dr. Salisbury and Dr. Caton had died before the trial. These objections were overruled.

And among other things the witness stated, in substance, that she had asked both Dr. Salisbury and Dr. Caton, while in attendance upon her husband professionally, if her husband had consumption or lung trouble, and they told her he had not.

The counsel for the defendant on this appeal insists that the evidence was inadmissible, as mere hearsay. We think the evidence was competent.

First. As bearing upon the question of fact, whether the witness did know with what disease her husband was in fact afflicted and of which he died. Of course, in order to prove her statement untrue, the defendant must show that she did know the precise disease of which her husband died, as the referee well remarks, "amid the conflict of opinion of medical men," there was afforded ample justification for a layman to say, he did not know the disease of which Charles Marsh died. Laymen can only form conclusions as to what disease caused the death of a person, in general, by the announcement of the physicians in attendance, and where these are vague or uncertain or conflicting, the only safe way for an applicant for insurance is to state his ignorance of the fact, as, if he should undertake to state precisely, what had caused the death, he might attribute it erroneously, or at all events, give rise to controversies such as this case discloses. Besides, the declarations of physicians while in attendance upon a patient are in some sense a part of the *res gestæ*. Stephens, in his recent work on the Law of Evidence, lays down as an established rule of evidence, a proposition under which the declarations of physicians as to what disease afflicts a patient are admissible. He says: "A declaration is relevant when it was made by the declarant in the ordinary course of business, or in the *discharge of a professional duty* at or near the time when the matter stated occurred, and of his own knowledge. Such declarations are irrelevant, except so far as they relate to the matter which the declarant stated in the ordinary course of his business or duty." (Stevens on Ev., art. 27, p. 33.)

Of course the declarations of Salisbury and Caton to Mrs. Marsh, of their opinion as to the nature of the disease which afflicted her husband, were declarations in the ordinary line of their professional duty, and as such, receivable in evidence to establish the fact, that they entertained such opinions as they stated.

This is all the exception in relation to the rulings upon the admissibility of evidence to which our attention has been called. As to the general merits of the case, we adopt the opinion of the learned referee, and must affirm the judgment.

Judgment affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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SAUNDERS IRVING, SOLE EXECUTOR, ETC., OF CLARISSA GREIG, DECEASED, v. JOHN RANKINE, ADMINISTRATOR, ETC., OF JOHN GREIG, DECEASED.

*Annuity — apportionment of — chap. 542 of 1875.*

A testator who died April 9, 1858, left to his wife, by will, his mansion-house and certain land, together with cattle, farming implements, furniture, etc., and an annuity for life of \$10,000 a year, to be paid in semi-annual payments, the first half yearly payment to be made in six months from his decease, such devises and bequests being given in lieu of dower. The annuity was payable October ninth and April ninth in each year. The wife died on April 1, 1877. In an action by her executor to recover the *pro rata* proportion of the annuity up to that date, *held*, that the annuity could not be apportioned. Chapter 542 of 1875, changing the common-law rule as to the apportionment of annuities, only applies to instruments executed or taking effect after its passage.

CONTROVERSY submitted upon an agreed statement of facts, without action.

*E. G. Lapham*, for the plaintiff.

*W. H. Adams*, for the defendant.

TALCOTT, J.:

This is a controversy submitted upon facts admitted. The facts are as follows:

John Greig, late of Canandaigua, died on the 9th day of April, 1856, leaving a last will and testament, whereby he devised to his wife Clarissa, in fee, his principal mansion-house and the land on which the same was situated, containing ten acres, and certain other premises containing thirty acres in the village of Canandaigua, and the stock of cattle, horses and carriages, implements of husbandry, farming utensils and crops growing on said premises; and also the furniture, plate, linen, paintings, books, liquors and other personal property, and also the stock of cattle, horses, carriages, implements of husbandry and farming utensils situate upon two farms, the title to which was in the said John Greig and his wife Clarissa, and which survived to her; and also an annuity for life of \$10,000 *per annum* in *semi-annual* payments, the first half yearly payment to be made in six months from his decease, which devise and bequests were given instead of, and in lieu and satisfaction of, dower in his estate.

The defendant John Rankin is the administrator of the estate of the said John Greig, with the will annexed. On the 1st day of April, 1877, Clarissa Greig, the widow and annuitant named in the will, died, leaving a last will and testament, which has been duly probated, and of which Saunders Irving, the plaintiff, is the sole executor and trustee. By the terms of the will of said John Greig the annuity of \$10,000 a year to said Clarissa Greig became payable on the ninth day of October and April in each year, and the same was paid to her to and including the ninth day of October, 1876, she having accepted the provisions of said will of John Greig in lieu of dower. John Greig died seized and possessed of a large real and personal estate, his real estate being valued at upwards of \$70,000. The said Clarissa Greig continued to occupy the homestead or "principal mansion house" of said John Greig, deceased, until her death, at an annual expense exceeding the amount of her said annuity. Said Rankin, the administrator of said John Greig, with the will annexed, declines to make any further payment on the said annuity, having doubts about his right to do so.

The question submitted to the court is, whether the plaintiff as

executor and trustee of the said Clarissa Greig, is entitled to an apportionment of the *semi-annual* installment of the said annuity, which would have become payable to Mrs. Greig had she lived until the ninth day of April last.

It is well settled at the common law that there can be no apportionment of annuities. (Williams on Executors, 109; 3 Redfield on Wills, 184, § 13; Story's Eq. Jur., vol. 1, § 410; *Griswold v. Griswold*, 4 Bradf., 216; *Wiggin v. Swett*, 6 Metcalf, 194.)

In the case of *Wiggin v. Swett*, cited, the husband provided in his will for the payment of an annuity of \$800 to his wife, in quarterly installments; the wife died three days before a quarterly installment became due, but it was held that the annuity could not be apportioned and that her representatives were not entitled to receive a *pro rata* payment.

There are two exceptions to this rule recognized by the English authorities, which have been put upon the necessities of the case. One is the case of an annuity for the support and maintenance of infants. (*Howell v. Hanforth*, 2 W. Black, 1016; *Hay v. Palmer*, 2. P. Wms., 501; *Ex parte Smyth*, 1 Swans., 349 and note.) So, an annuity for the support of a wife, living separate and apart from her husband. (Note to 1 Swanst., 349, above cited.) These exceptions have been allowed from the necessities of the case, as otherwise the infants in the one case, or the wife living upon a separate maintenance in the other, could not procure credit for necessities from the time when one installment became due to the next, unless the creditor should chose to take the risk of the annuitant surviving until the next installment became due. These, however, are noticed as remarkable exceptions to the general rule; and it has been held that they were not applicable to the case of a married woman living with and supported by her husband; and we do not find that they have ever been extended beyond the two cases referred to.

It is claimed by the executor of Mrs. Greig that a provision in lieu of dower falls within the same principle; but, in this case at least, there cannot be the same ground of necessity, for, besides a large and valuable property given to her in fee, Mrs. Greig had other valuable property, viz., the two farms which she took by survivorship. It is said that in the case of *Wiggin v. Swett* (6 Met., 194) it did not appear that the annuity was given in lieu of dower. It does not

appear in the case how that was; and though probably the annuity was in lieu of dower, the circumstance not being referred to as making any difference, shows that the court considered it of no importance in the application of the common-law rule.

The rule of the common law on this subject has been abrogated as to annuities created by any instrument executed or going into operation after the passage of the statute (4th Wm. IV, c. II), and parliament has been followed by the legislature of this State (see Laws of 1875, ch. 542), likewise confined in its operation to instruments executed or taking effect after the passage of the act. The will of John Greig took effect on the ninth day of April, 1858, and therefore does not come within the provisions of the act of 1875.

We therefore think the representative of Mrs. Greig has no legal claim to any part of the annuity which would have accrued from October 9, 1876, to April 9, 1877; and, in pursuance of the stipulation, we order a judgment to be entered in favor of the defendant, with costs and disbursements, but without costs for any proceedings prior to notice of trial.

Present — MULLIN, P. J., and TALCOTT, J.; SMITH, J., not sitting.

Judgment in favor of the defendant, with costs and disbursements, but without costs for any proceedings prior to notice of trial.

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ANSEL EMERSON, RESPONDENT, v. THE AUBURN AND  
OWASCO LAKE RAILROAD, APPELLANT.

*Summons — served upon corporation — “managing agent” of — who is.*

One Treat, the president and superintendent of a street railway in Auburn, was, on June 1, 1876, employed by the president of the defendant, a steam railroad company, to superintend the running of horse cars on a portion of defendant's road not yet completed. Treat had no authority to make contracts for the defendant, except to purchase horses and feed; nor had he any control over or knowledge of the affairs of the defendant, or its books; his employment was to continue during the president's pleasure.

*Held*, that a summons, in an action against the defendant, could not be served upon him as its “managing agent.”



APPEAL from an order made at the Special Term, denying a motion to set aside the service of a summons.

*Ed. C. Marvin*, for the appellant.

*Wood & Rathbun*, for the respondent.

TALCOTT, J.:

This is an appeal by the defendant, from an order of the Onondaga Special Term, refusing to set aside the service of a summons in this action. The attorney for the defendant appeared for the purposes of the motion only, and moved to set aside the service of the summons, upon the ground that it was served upon a man who was casually and temporarily in the employ of the defendant.

Manly T. Treat, the person upon whom the service was made, as appears by his affidavit read on the motion, was the president and superintendent of a street railroad company in Auburn, known as the East Genesee Street and Seward Avenue railway, and on or about June 1, 1876, Elmore P. Ross, the president of the defendant, on a personal interview with the witness, employed the witness to superintend the running of horse cars for the conveyance of passengers, on a portion of defendant's road not yet completed; that the witness does not make, nor has he any authority to make, any contracts for the defendant, except for the purchases of horses and feed needed for the said portion of the passenger traffic of the defendant; that the witness, under the direction of the said president, has hired two men to act as drivers on said road, and that he never sells tickets, or takes fares on the defendant's road; that he has no control over, or knowledge of the affairs of the defendant, or knowledge of its finances or books, and that he was employed by said president as aforesaid, for no stated time, but for a term to continue at the pleasure of the said president, and that said Elmore P. Ross has been for several years the president of the defendant, and Charles N. Ross is the secretary and treasurer of the defendant, and both of these have offices within a few rods of the office of the plaintiff's attorney.

No complaint was served with the summons.

It appears to be plain that the person served was not the "man-

aging agent" of the defendant. (See *Brewster v. The Mich. Central R. R.*, 5 How., 183.) Where it is held in an opinion by WELLS, J., that a managing agent within the meaning of the statute in reference to the service of summons on a corporation, must be one who is engaged in the management of the corporation, in distinction from the management of a particular branch or department of its business. See, also, *Flynn v. Hudson Railroad Company* (6 How., 308), where it was held that to be a "managing agent" within the meaning of the said statute, the person "must have the same general supervision and control of the general interests of the corporation that are usually associated with the office of cashier or secretary." In *Doty v. Michigan Central Railroad* (8 Abb., 427) it was held, that a person who had sole charge of selling tickets for the defendant, was not a managing agent and service upon him was set aside.

It is suggested that the motion was denied because the affidavit read on behalf of the defendant did not specify the grounds of the motion under the forty-sixth rule of the court. That rule applies only to motions for *irregularity*. The motion in this case went to the jurisdiction of the court, and probably, a judgment taken by default, in an action founded on such a service would be wholly void.

Nor was the defendant compelled to wait until the plaintiff had taken any further steps. It is necessary to hold these services of summons strictly within the statute limitation, or otherwise, great frauds may be perpetrated by attempting to get jurisdiction of a corporation by service upon some mere employe, who has nothing to do with the general management of the corporation.

The order appealed from is reversed, with ten dollars costs and disbursements, and the service is set aside with ten dollars costs of the motion.

Present — MULLIN, P. J., TALCOTT, and SMITH, JJ.

Order appealed from reversed, with ten dollars costs and disbursements, and service of the summons set aside with ten dollars costs of the motion.

JAMES H. BURHANS, RESPONDENT, v. LESTER CARTER,  
APPELLANT.

*Exchange of note for bond and mortgage—failure of consideration—Agreement varying terms of note—when it cannot be established by parol.*

Prior to September 29, 1871, Weir, as the testamentary guardian of the plaintiff, had received \$500 in cash and a bond and mortgage for \$1,100. On that day plaintiff and Weir stated to the defendant that Weir had used and spent the \$500; that he could not repay the same and could only secure it by a bond and mortgage on his house which was already incumbered; that Weir could not make a mortgage directly to his ward and asked defendant to take a bond and mortgage on Weir's house and give his note for the \$500. Defendant accordingly gave a promissory note for \$500, payable February 7, 1875, when plaintiff would be of age, "to Robert Weir, as guardian of James H. Burhans," with interest payable annually, and received from Weir a bond and mortgage for the same amount, payable at the same time. Subsequently Weir's house was sold upon the foreclosure of a prior mortgage and no surplus remained for payment of defendant's mortgage.

In an action upon the note, *held*, that upon the exchange of the note for the bond and mortgage each became a valid and legal obligation, enforceable by the holder as a purchaser for value, and that plaintiff was entitled to recover though defendant had received nothing upon his mortgage.

*Seemle*, that an agreement that the defendant should not be liable on the note according to the terms thereof, but only for so much as he should receive upon the bond and mortgage, could not be established by parol.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

*S. R. Pratt*, for the appellant. There was a total failure of consideration for the note, and the plaintiff was not entitled to recover. (*Aldrich v. Stockwell*, 9 Allen, 45; *Sawyer v. Chambers*, 44 Barb., 42; S. C., 43 id., 622; *Colville v. Besley*, 2 Denio, 139; *Cross v. Huntley*, 13 Wend., 385; *Head v. Stevens*, 19 id., 411; *McDougall v. Fogg*, 2 Bosw., 387; *Tappan v. Van Waggenen*, 3 Johns., 465; *Briggs v. Vanderbilt*, 19 Barb., 222; *Hills v. Bannister*, 8 Cowen, 31; *Spaulding v. Vandercook*, 2 Wend., 431; 1 Parsons on Contracts, 462.)

*A. H. Francis*, for the respondent. The evidence of defendant and Weir shows valid, legal and full consideration for the note, in

the bond and mortgage and the \$1,100 mortgage delivered up by Weir, as between Weir and defendant. (*Fay v. Richards*, 21 Wend., 626; *Dowe v. Schutt*, 2 Denio, 621; *Wooster, etc., v. Jenkins*, 3 id., 187; *Troy City Bank v. McSpedon*, 33 Barb., 81; *Bassett v. Bassett*, 55 id., 505; 6 Duer, 341; 15 Johns., 44.)

TALCOTT, J. :

This is an appeal from a judgment entered on the report of a referee. The action is upon a promissory note made by the defendant to one Robert Weir, as guardian of the plaintiff, on the 29th day of September, in the year 1871. The answer admits the making of the note, but alleges that it was given without consideration, and solely for the accommodation of the said Wier as such guardian. The second defense contains allegations that defendant was induced to give the note by representations of Weir, and the plaintiff, that defendant should not be put to any cost or expense on account of the note, and that the same was obtained through false representations as to the value of a certain bond and mortgage, executed by Weir and wife to the defendant at the time when the defendant gave the note.

The facts of the case seem to be as follows: The said Robert Weir was a testamentary guardian of the plaintiff, who, at the time of the giving of the note, was about eighteen years old, and was then boarding in the family of the defendant, at Champion, in the State of New York. There had come to the possession of Wier, as such guardian, the sum of \$500, which he had received from the defendant as the purchase-money of a parcel of land, purchased of the father of the plaintiff in his lifetime, and also a bond and mortgage made by the defendant for about \$1,100. On the day of the making of the note Wier came to the defendant and told him that he (Weir) was in trouble; that he had used the \$500 which had been paid to him as the guardian of the plaintiff, in his own business, and the same was spent; that he had no means of securing the amount to the plaintiff, except by giving a bond accompanied by a mortgage on a house and lot in which Wier then resided, and already incumbered, and requested the defendant to take said mortgage and execute the note in question, payable on the 7th day of February, 1875, when the plaintiff would arrive at full age, Wier

giving as a reason for this, that he could not make the mortgage directly to his ward. When the plaintiff was informed of the fact of Weir's insolvency, and that he had spent the \$500, he also urged the defendant to accept Weir's proposal, and also urged him to take from Weir's possession the bond and mortgage of \$1,100. The referee finds "that the defendant, after consultation with said infant, and at said infant's urgent solicitation, finally consented to and with said Weir to take said bond and mortgage and give his (defendant's) note in exchange, on the further condition that said Weir should surrender and give up the \$1,100 mortgage made by the defendant which he (Weir) held as guardian of said infant."

This arrangement was finally consummated, Weir giving his bond, secured by a mortgage on the dwelling-house, conditioned to pay the defendant the sum of \$500, on the 7th day of February, 1875, with interest annually, and all taxes to be assessed against the said defendant by reason of said bond and mortgage, and at the same time surrendered to the infant the \$1,100 bond and mortgage, and received as such guardian the defendant's note, purporting to be for value received, for \$500, with annual interest payable on the 7th of February, 1875, "to Robert Weir as guardian of James H. Burhans." Afterwards Weir was superseded in his guardianship and one Merrill was appointed by the surrogate of Jefferson county as guardian of the plaintiff, who, on the plaintiff coming of age, delivered to him the note for \$500. The premises covered by Weir's mortgage were sold on the 5th day of October, 1872, on the foreclosure of a prior mortgage, one of the incumbrances of which the defendant had been notified by Weir at the time of giving the note, and sold for less than the amount due on the judgment of foreclosure. The defendant did not attend the sale.

There appears to have been no evidence to sustain the allegations of the defendant that the bond and mortgage were obtained through false representations, and no finding by the referee on the subject. There was no finding by the referee that either Weir or the plaintiff agreed at the time of the giving of the note, that the defendant should not be called upon to pay upon it any more than he should receive on the bond and mortgage which was executed to him by Weir. On the settlement of the case the referee was specially

requested to find that such an agreement was made both by the plaintiff and by Weir, but declined so to do.

There was evidence that both the plaintiff and Weir had made substantially such an agreement, consisting of the testimony of the defendant and his wife and daughter. On the other hand, the testimony of the plaintiff and Weir distinctly repudiated any such agreement, and in addition to this was the evidence contained on the face of the papers. The bond and mortgage of Weir were made to the plaintiff. The mortgage contained not only the usual consideration clause, but a statement that the grant was intended as security for the payment of the sum of \$500 with the interest, and the note purports to have been given for value received. Considering that an agreement that the defendant should be bound to pay no more on the note than he should be able to collect and receive on the bond and mortgage was an affirmative fact for the defendant to establish, we cannot say that the referee erred in determining this question of fact upon the conflicting evidence.

The fact being thus determined, the question arises as to whether an exchange of securities for mutual accommodation and without any agreement on either side for indemnity, or that they are not to be paid according to the face of the contracts, can be enforced in the hands of the original parties, who have not paid or parted with any new consideration.

The alleged agreement that the defendant should not be liable on the note according to the face of the promise, but for only so much as he should receive from Weir's bond and mortgage, probably could not be established by parol. (*Erwin v. Saunders*, 1 Cow., 249; *Ely v. Kilborn*, 5 Den., 514; *Payne v. Ladue*, 1 Hill, 116; *Brown v. Hull*, 1 Den., 400.)

However that may be in the exchange of the securities, the bond and mortgage for \$500 and interest, and the defendant's note for the same amount, payable at the same time, in the absence of any agreement that the defendant was not to be required to pay his note, though it was done for the accommodation and benefit of Weir and the plaintiff, was valid, as each security formed a good consideration for the other at law, though it finally resulted that the defendant in fact realized nothing from the bond and mortgage made to him. "Where cross-notes are made and specifically exchanged by

the makers, each note is the proper debt of the maker thereof, and each holder is a purchaser for value." (*Dowe v. Schutt*, 2 Den., 621; *Rice v. Mather*, 3 Wend., 62; *Cameron v. Chappell et al.*, 24 Wend., 94; *Prest. of Troy City Bk. v. McSpedon*, 3 Abb. Appeal Decisions, 133; *Bassett v. Bassett et al.*, 55 Barb., 505.)

On the findings of the referee, therefore, the judgment must be affirmed.

Judgment affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

ELIJAH M. MERKEE, RESPONDENT, v. THE CITY OF ROCHESTER,  
ESTER, APPELLANT.

18h	157
39 Mis	230
13h	157
40 Mis	167

*Process — voluntary appearance — when sufficient — Violation of city ordinance — power to imprison in jail does not authorize imprisonment in penitentiary.*

The want of process to bring a defendant into court may be waived by a voluntary appearance in the action; but to be effectual, such appearance must be with knowledge that there is an action pending and with a full intention to appear therein.

The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, unless he notify him that an action is pending against him and unless he fully understands the nature of the proceedings.

By the charter of the city of Rochester the police justice thereof has jurisdiction in suits brought for a violation of any of the city ordinances, and is authorized to enter a judgment commanding a penalty, recovered for a violation of said ordinances, to be made of the goods and chattels of the defendant, if such can be found; and if not, then to commit the defendant to the county jail for such time as shall have been directed by the common council, unless otherwise provided by the charter. The plaintiff having been adjudged guilty of a violation of one of the city ordinances, was sentenced to pay fifty dollars, or, in default thereof, to be imprisoned in the Monroe county penitentiary for ninety days.

*Held*, that the judgment was void, (1) because it did not appear that the common council had made any direction as to the length of time for which persons found guilty of violating city ordinances should be imprisoned, and (2) because the charter authorized an imprisonment in the county jail only, and not in the county penitentiary.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order of the Special Term denying a motion for a new trial made upon a case and exceptions.

*J. B. Perkins*, for the appellant.

*J. A. Adlington*, for the respondent.

TALCOTT, J. :

This is an appeal from a judgment for the plaintiff, rendered on a verdict in the County Court of Monroe county, and from an order denying a new trial.

The action is to recover back money alleged to have been wrongfully extorted from the plaintiff, for the benefit of the defendant, by the police justice of the said city of Rochester. It appears that the money, fifty dollars, was paid by the plaintiff in pursuance of a judgment rendered by the said police justice, whereby the plaintiff was ordered to pay the said sum of fifty dollars, or be committed in default thereof to the Monroe county penitentiary for the term of ninety days, and the plaintiff claims that the money was paid under threat of, and to save himself from the imprisonment imposed by the judgment.

The complaint against the plaintiff was for the violation of a city ordinance, which provides that no person shall exhibit or perform, for gain or profit, any theatrical or circus representation or exhibitions, or any other idle shows or feats which common showmen or jugglers usually practice or perform for private emolument or gain, without having obtained a license for the same from the common council of said city, under a penalty of fifty dollars for each offense.

It appears that the plaintiff is what is known as a spiritual medium, and for gain gave exhibitions, commonly called seances, in said city, without having obtained a license. The defense to this action to recover back the fifty dollars imposed as a penalty under the ordinance, is that a judgment for such penalty was duly recovered before the police justice of said city, on a plea of guilty by Marker, and that the fifty dollars was paid in pursuance of such judgment.

By section 245 of title 10, of the charter of said city it is provided, that "the police justice of said city shall have jurisdiction in suits brought for a violation of any of the city ordinances." The



police justice was examined on the trial and produced his docket, which contained the following entry :

“ IN POLICE COURT, AUGUST 21, 1876.

THE CITY OF ROCHESTER v. ELLIAH M. MARKER.

*Violating section 24 of Ordinance relating to Nuisances.*

PLEAD GUILTY.

Judgment for one penalty fifty dollars ; in default of payment, to be imprisoned in the M. C. P. for ninety days.”

It appears that no warrant, or other process, was served on the plaintiff to bring him into court. According to the plaintiff's statement he went to the office of the city clerk and asked him if it was necessary, in the city of Rochester, to take out a license for holding spiritual seances or religious meetings of any kind. The clerk read the ordinance in question, and said it would come under the head of jugglers, and said the plaintiff would have to take out a license, and the plaintiff asked the clerk what the fee would be for six weeks, and was answered that he (the clerk) could not tell till he had ascertained what the back fee would be, till he (the plaintiff) paid up the old scores. This seems to have had reference to the fact that the plaintiff had already given several performances without having obtained any license therefor. Finally, the plaintiff says the clerk told him, if he was in a hurry, to come with him to the Justices' Court. The clerk then took him to the police office, and when there the clerk said to the police justice: “This is the man that holds spiritual circles.” The plaintiff then said: “Yes, I am the man.” The police justice then inquired of the plaintiff if he (plaintiff) had held these circles; to which the plaintiff answered in the affirmative. The police justice then inquired of plaintiff if he (plaintiff) took money at the door; to which plaintiff replied that he did not take money at the door, but only took money from those present at the circles, after they were seated. And the police justice then said to the plaintiff: “You have violated one of the penal ordinances of the city, and I fine you fifty dollars, or ninety days in the county jail,” and then turned the plaintiff over to the custody of the chief of police. The plaintiff further says

that no process was served upon him, and he was not asked to submit himself to the jurisdiction of the Police Court; and, in fact, that nothing further took place at the police office, before the payment of the fine, than he had in substance related.

It is very clear that if the account of the plaintiff as to what transpired at the police office is correct and contains a statement of all that occurred there, the police justice gained no jurisdiction over his person for the purpose of proceeding to judgment. Jurisdiction of the person may always be denied or put in issue. According to the account of the plaintiff he was not aware that any suit was proceeding and did not intend to appear in any suit, but supposed that what transpired at the police office was only a casual conversation, of no legal effect or pertinence.

The police justice entered in his docket a memorandum as though the proceedings had been had in a regular suit, and that the defendant pleaded guilty to a violation of the ordinance, whereas, according to his statement he only admitted what the city clerk had said, that he (the plaintiff) was the person who gave spiritual seances, without at all conceding that they required to be licensed under the ordinance.

The want of a process to bring a defendant into court may, it is true, be waived by a voluntary appearance in the suit; but a voluntary appearance, to be effectual for this purpose, must be with knowledge that there is a suit pending and with a full intention to appear therein. The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, without advising him that a suit is pending against him, nor without a full understanding on the part of the defendant as to the nature of the proceedings.

If the statement of the plaintiff is correct, not only he did not understand that he was voluntarily appearing and pleading guilty, in an action for a penalty for violating an ordinance of the city of Rochester, but he did not understand and was not informed that any such action had been commenced against him, and would not have pleaded guilty thereto if he had known of the complaint.

The testimony of the city clerk tends to corroborate that of the plaintiff in regard to what took place at the police office, though that of the police justice tends to establish that the plaintiff fully

understood that a complaint was made against him for violating the ordinance, and that he deliberately and understandingly pleaded guilty thereto. Of the weight and effect of this conflicting evidence the jury were the judges, under proper instructions from the court. But the defendant's counsel claim that the judge decided this conflict of the evidence in favor of the plaintiff, by instructing the jury that the judgment rendered by the police justice was utterly null and void, and thus withdrew from their consideration the question whether the plaintiff was informed that a complaint was made against him, and was informed of the nature thereof, and knowingly pleaded guilty thereto. This part of the charge of the county judge was excepted to. He was requested to submit to the jury the question whether the plaintiff appeared in the action against him before the police justice, and to charge the jury that if he voluntarily appeared and submitted himself to the jurisdiction of the court and pleaded that he had violated the ordinance, then, that the judgment entered against him was valid. To this the court made answer: "I decline so to charge, and go further, and say that there was no action pending before the police justice in favor of the city." To which the defendant's counsel excepted.

The counsel for the plaintiff claims that the judgment is a nullity on its face because it is a judgment in a civil action for a penalty of fifty dollars, and directs, in default of its payment, the plaintiff be imprisoned for ninety days in the Monroe county penitentiary.

A judgment for a penalty recovered for the violation of an ordinance is, apparently, authorized by section 240 of title 10 of defendant's charter to command the amount to be made of the goods and chattels of the defendant if such can be found, if not then to commit the defendant to the county jail for such time as shall have been directed by the common council, unless otherwise provided by the charter. It does not clearly appear upon what ground the county judge charged the jury that the judgment purporting to have been rendered by the police justice was "utterly null and void," nor upon what ground the plaintiff's counsel claims it to have been void on its face, and we are left to speculate upon the subject *de novo*.

It could not be for want of process to bring the defendant before the court, for in a civil action a voluntary appearance waives the

irregularity, or even the want of process. (*Allen v. Malcolm*, 12 Abbott [N. S.], 337.) And it is well established that in a civil action the defendant may appear *gratis*, that is, without any process to compel him to appear. But though we do not think the judgment void, as seems to be supposed by the plaintiff's counsel, and seems to have been supposed by the county judge, because of the want of any process to bring the defendant into court, nevertheless we think the judgment might well have been held to be void for the two following reasons:

First. It did not appear in the case that the common council had made any direction, as to the length of time for which the defendant should be committed to jail under the said section 240 of the defendant's charter.

Second. The said section 240 only authorizes imprisonment in default of payment in the *county jail* of Monroe county, and we are not referred to any statute which authorizes, in such cases, a judgment for imprisonment in the "*Monroe county penitentiary*" for default of goods and chattels, whereof to make the amount of the recovery in such an action.

For these reasons, therefore, we are of the opinion that the judgment rendered by the police justice was void, and that the money which the plaintiff sued to recover was paid under the duress of a void judgment and could be recovered back.

Judgment and order affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment and order of Monroe County Court denying a new trial, affirmed.

COLUMBUS C. RISLEY, AS EXECUTOR, ETC., OF ELIZA R. WIGHTMAN, RESPONDENT, v. JAMES R. WIGHTMAN, APPELLANT.

*Plaintiff described in pleading as executor instead of as administrator — amendment allowed at General Term — Defect of parties — must be pleaded — Indorsement on note — when it takes a case out of statute of limitations.*

In this action, brought upon a promissory note made and delivered to one Eliza R. Wightman, the complaint alleged her death, the admission of her will to probate, and the issue of letters testamentary to the plaintiff as sole executor. The answer denied the appointment of plaintiff as executor and the issue of letters testamentary to him. Upon the trial it appeared that no executor had been named in the will, and that letters of administration with the will annexed had been granted to the plaintiff and one Harriet E. Ackerley.

*Held*, that the error in the description of the representative character of the plaintiff was amendable, either before or after judgment, and that such amendment should be allowed by the General Term upon appeal.

That any defect of parties plaintiff, arising from the omission of the plaintiff to join his co-administratrix with him, was waived by the failure of the defendant to set up the defect in his answer.

The defendant claimed that the action was barred by the statute of limitations.

The note was dated March 1, 1864, payable one year after date. Upon the back of the note were indorsements of interest in the handwriting of the testatrix, dated in 1865, 1866, 1867, 1868 and 1869, and May 9, 1870. The action was commenced April 12, 1876.

*Held*, as the indorsements purported to have been made by the testatrix before the note was outlawed, they were admissible in evidence against the defendant, without proof of actual payment.

Whether or not such payments were actually made was a question for the jury.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

*H. J. Coggeshall*, for the appellant.

*Henry T. Wiley*, for the respondent.

TALCOTT, J. :

This is an appeal from a judgment recovered on a verdict rendered at the Oneida circuit. The action is upon a promissory note made and delivered to one Eliza R. Wightman in her lifetime, and the plaintiff sues as her executor.

In the complaint, after alleging the death of Eliza R. Wightman, he alleges that the will was admitted to probate by the surrogate of Oneida county, and that letters testamentary were, thereupon, duly issued to the plaintiff as sole executor. The defendant by his answer denied that the plaintiff was ever appointed executor of Eliza R. Wightman, or that letters testamentary were ever issued to the plaintiff as sole executor of said Eliza.

When the will came to be introduced it appeared that the places left for the names of executors had never been filled up, and that instead of letters testamentary having been issued to the plaintiff, he had, jointly with one Harriet E. Ackerley, been appointed administrator with the will annexed, and the defendant moved for a non-suit on the ground, that "this action having been brought and prosecuted in the name of the plaintiff as sole executor, and the evidence showing that he is administrator with the will annexed, he cannot under the pleadings recover as such sole executor;" and, that the action is brought and prosecuted in the name of Columbus C. Risley, as sole executor of the estate of Eliza R. Wightman, deceased, whereas, the letters offered by plaintiff and received in evidence, show that Columbus C. Risley is not such sole executor, but is co-administrator with Harriet E. Ackerly, with the will annexed. The objection thus made presented two points: First, Whether the plaintiff could recover by reason of the variance in his description of his representative character; second, because of the non-joinder as plaintiff of the co-administratrix of the plaintiff. As to the misdescription by the plaintiff of his representative character the complaint was amendable in that respect and should be amended accordingly. (*Bank of Havana v. Magee*, 20 N. Y., 355.) Where it is held that a misdescription of the plaintiff is amendable before or after judgment. As an amendment describing the plaintiff as administrator, with the will annexed, instead of executor, does not change the rights of the parties, and constitutes a mere technical variance in the description of the representative character, and the defendant has not been in any way misled or injured by such misdescription, the complaint is ordered to be amended under section 173 of the Code of Procedure in force when this action was tried, and section 723 of the Code of Civil Procedure, by stating the title of the plaintiff as that of administrator, with the

will annexed, and by changing the averment that letters testamentary were issued to the plaintiff by the surrogate of Oneida county, to an averment that letters of administration, with the will annexed, were so issued.

As to the non-joinder, the answer does not set up any facts showing any defects of parties plaintiff; and as no such defect appears on the face of the complaint, the non-joinder of the co-administrator was waived by the defendant, when he omitted to allege in his answer the facts which show that Harriet E. Ackerley ought to have been joined with the plaintiff in bringing the action. If such facts had been set up in the answer, the plaintiff might have come to the trial prepared to show that Harriet E. Ackerley had resigned or been removed before the action was commenced.

The defendant also set up, by way of defense, that the cause of action did not accrue within six years next before the commencement of the suit. The note in question was dated March 1, 1864, payable one year after date; certain indorsements of partial payments on the note were proved to be in the handwriting of the testatrix. The indorsements were dated in 1865, 1866, 1867, 1868, 1869, and the last, a payment of twenty dollars, on May 9, 1870. The testatrix died in 1875, and the suit was commenced April 12, 1876. The part payment, May 9, 1870, took the case out of the statute for six years ensuing that payment. (Code, § 110.)

The indorsements in the handwriting of the testatrix which purport to have been made before the note was outlawed were admissible in evidence. The fact that the indorsements constituted admissions against the interest of the testatrix, at the time they were made, rendered them admissible in evidence against the defendant, without proof of the actual payments. Whether the payments were actually made was a question for the jury. (*Roseboom v. Billington*, 17 Johns., 182; *Coffin v. Bucknam*, 12 Maine, 471; *Smith's Leading Cases*, 725, marginal.)

The judgment is affirmed and the amendment of the complaint specified in this opinion ordered.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed and complaint ordered to be amended as specified in the opinion.

13	166
57	269

NORTHERN INSURANCE COMPANY OF NEW YORK,  
RESPONDENT, v. JOHN C. WRIGHT, APPELLANT.

*Surety — request that creditor will foreclose mortgage — neglect to comply with—  
effect of.*

The defendant being the owner of a bond and mortgage, dated September 28, 1869, for \$4,400, \$500 of principal being payable on January first of each year from date, assigned the same on September 26, 1872, guaranteeing that the security was sufficient for the payment of the amount thereof, and guaranteeing also the collection of the same. In January, 1873, several installments of principal being due and unpaid the secretary of the plaintiff, who then held the bond and mortgage under such assignment and guarantee, wrote to the defendant in regard to it. The defendant called at the office and notified the secretary that he wanted the company to foreclose the said mortgage. The company neglected to foreclose the mortgage until October 13, 1875. In the meantime a frame dwelling, worth \$2,000, had burned down, and only \$700 of insurance was received thereon.

A deficiency having arisen upon the sale, for which it was sought to hold the defendant liable, *held*, that the act of the company in failing, for more than two years, to foreclose the mortgage, after defendant had requested it so to do, relieved him from all liability for the deficiency which had arisen.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee in an action brought upon the following guarantee given by the defendant as administrator of Lucinda Wright, upon the assignment of a bond and mortgage given by Michael Langdon to defendant's intestate, to wit: "I, John C. Wright, do hereby guarantee that the said security is amply sufficient for the payment of the amount secured to be paid by said mortgage, and I hereby guarantee the collection of the said mortgage."

*McCartin & Williams*, for the appellant.

*J. Mullin, Jr.*, for the respondent.

TALCOTT, J. :

This is an appeal from a judgment entered on the report of a referee. The action is brought on a guaranty of collection on the assignment of a bond and mortgage. The bond and mortgage



assigned were dated on the 28th of September, 1869, and were to secure \$4,400 of principal, payable \$500 on the first day of January in each year thereafter with interest annually. The defendant held the legal title to the said bond and mortgage as administrator of Lucinda Wright, whose sole heir he also was. The plaintiff is the successor to the title of the Black River Insurance Company. On the 26th day of September, 1872, the defendant assigned the bond and mortgage to George F. Paddock and accompanied such assignment with his guaranty, that the security was sufficient for the payment of the amount secured to be paid by said mortgage, and a guaranty of the collection of said bond and mortgage; and on the 20th of October, 1872, Paddock duly assigned the said bond and mortgage and guaranty of collection to the Black River Insurance Company, the name of which has been changed to that of the plaintiff, under chapter 208 of the Laws of 1875. The defendant was a director of the Black River Insurance Company and a member of the executive committee of said board until January 4, 1874, but never attended any meeting of said board or said committee after February 3, 1873. Orrin C. Frost was the secretary of the Black River Insurance Company from its organization until January 4, 1874. In January, 1873, several installments of principal having become due on said bond and mortgage and remaining unpaid, Frost, as such secretary, wrote to the defendant in regard to the payments due on the mortgage, and requested him to see Mr. Langdon, the mortgagee, and have it paid. In response to that letter the defendant called at the office of the Black River Insurance Company, and then and there notified Frost that he wanted the company "to foreclose the said mortgage, and by due course of law." At that time there was a frame dwelling-house upon the mortgaged premises worth some \$2,000, which was destroyed by fire in October of the same year. The building was insured for \$1,000, but in consequence of a dispute as to the liability of the insurance company only \$700 was paid upon the loss, which was paid to the Black River Insurance Company.

The Black River Insurance Company commenced a foreclosure of the said mortgage on the 13th day of October, 1875, and obtained a judgment of foreclosure and sale, and in and by the said judgment it was adjudged that there was due to the insurance company, as

assignee of said mortgage, the sum of \$4,561.48 for its debt and \$120.99 costs. The defendant was made a party defendant in that suit, but no personal claim was made against him. The referee finds that Frost never communicated to any of the other officers of the company the request of the defendant that the mortgage should be foreclosed.

Here was a delay of some two years and nine months, after the Black River Insurance Company had been expressly requested by the surety to proceed and enforce the collection of the demand against the principal, before any proceedings were commenced to that end, when the security was in all probability good for the amount then due and which would have become due while the foreclosure was in progress. It is well settled in this State that if a surety requests the holder to proceed and enforce his security against the principal, and he omits to do so within a reasonable time so that a loss occurs, the surety is discharged. (*King v. Baldwin*, 17 Johns., 384; *Remsen v. Beekman*, 25 N. Y., 552.)

But again. The action is upon a guarantee of collection, and no notice was necessary from the surety to the creditor requiring the latter to proceed with due diligence to collect the principal security. It is a condition precedent in such a case that the creditor shall diligently endeavor to collect the amount of the principal debtor, by exhausting the ordinary legal remedies for that purpose, and if he fails to do this the surety is discharged.

In *Keyes v. Tift* (1 Cow., 98) it was held that the allowance of the lapse of one term after the debt became due without suit against the principal, discharged the surety.

In *Craig v. Parkis* (40 N. Y., 181) it was held that a delay of six months in foreclosing a mortgage after a payment became due, discharged the guarantor. (See, also, *Moakley v. Riggs*, 19 Johns., 69; *Loveland v. Shepard*, 2 Hill, 139.)

The referee seems to recognize this as the settled law, for he finds that the creditor was bound to proceed with due diligence to collect the amount due on the bond and mortgage as the same became due and payable, by process of law, "as a condition precedent to a recovery on said guarantee against the defendant," but he allows a recovery against the defendant upon the ground, as stated by him, that, "by his acts and negotiations with the officers of the said

insurance company and plaintiff, he waived a strict compliance with such condition precedent." We do not see in the case any sufficient evidence of a waiver on the part of the defendant of a compliance with the conditions precedent. It appears that in April, 1873, the mortgagor and obligor, wishing to remove from the premises, conveyed them to the defendant under an agreement that the defendant might sell them, returning to the mortgagor any surplus that should be obtained on the sale over and above the amount of the bond and mortgage held by the insurance company, to which mortgage the conveyance was made subject. The defendant did not, in any manner, assume the payment of the bond and mortgage.

It is said, too, that the defendant kept the fact that he had a conveyance of the premises concealed from the insurance company. The evidence, perhaps, tends to show that the defendant did not mention the fact of this conveyance to the officers of the insurance company, but fails to show that the conveyance was surreptitiously taken, or was intentionally concealed. It was put upon record in May, 1873, and the defendant was in possession, so far as anybody was (the mortgagor having left the farm and removed to another place). Besides, there was no reason why the defendant was bound to notify the insurance company of the fact of the conveyance. It was an arrangement, as appears, made by them for the convenience of the mortgagor, that if the defendant had an opportunity to sell the place, he might be in a position to convey without sending to the mortgagor for a deed.

The defendant resided in the neighborhood of the mortgaged premises, some sixteen miles distant from the office of the insurance company. The president of the company testifies that the defendant told him that the mortgagor was a poor man, and advised that the property be sold, and that he, the president, acquiesced in the plan and arranged with the defendant to negotiate a sale if possible, and frequently inquired if he had perfected a sale — to which, the defendant replied, that he had not and that he had written to one or two persons about it. In all this, we see no evidence of any intention on the part of the defendant to waive any of his rights as a surety, but his acts seemed to have been entirely consistent with a desire to have the matter so arranged, that both himself and the insurance company, should, if possible, be saved from loss.

We think there was no evidence of any waiver of the condition precedent ; especially as the defendant had made a special request that the mortgage should be foreclosed at once, and the company failing to take any measures for that purpose the defendant might well have considered himself discharged from his guaranty, and the acts and negotiations by him afterwards which have been adverted to, are, we think, not inconsistent with an intention of insisting upon the rules of law as applicable to his case. The question fairly arose on a motion for a nonsuit and on the exceptions to the decision. As this view, if correct, disposes of the case, we do not examine any of the other exceptions.

Judgment reversed and new trial ordered before another referee, costs to abide the event.

Present — TALCOTT and SMITH, JJ. ; MULLIN, P. J., not sitting.

Judgment reversed and new trial ordered before another referee, costs to abide the event.

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THE CAYUGA RAILWAY COMPANY, PLAINTIFF, v. CORNELIUS A. NILES, DEFENDANT.

*Parol agreement — easement cannot be created by — not to be performed under one year — when it inures as a license.*

The defendant's assignor having a five years' lease of certain lands, upon which was a stone quarry, entered into a parol agreement with plaintiff's assignor, by which the latter, a railroad company, were to lay a side track to the quarry over the leased land; and were to be allowed to take such loose dirt and stone as they might need for their road, for which they were to pay plaintiff's assignor \$100 per year, and he was to use the side track to ship his stone. The agreement was to continue during the term of the lease. Subsequently the plaintiff, having become vested with all the rights of the first company, paid fifty dollars on account of the rent and used the side track to draw stone and dirt. Thereafter, desiring to abandon the agreement and take up the tracks, they were prevented by the defendant from removing the same.

In this action of replevin, brought by the railroad company to recover the iron and ties and for damages for the detention of the same, held, that the effect

of the agreement would be to give the company an easement in the land upon which the tracks were laid, and that, as it was a parol agreement, it was void under the statute of frauds.

That it was also void, because it was a contract not to be performed within one year.

That the agreement, though void as a contract, was valid as a license; the company were not therefore trespassers in laying the tracks thereunder, and that for that reason the rails and ties so laid down did not become fixtures.

That plaintiff was entitled to recover.

MOTION for a new trial on a case and exceptions ordered to be heard, in the first instance, at the General Term, after a verdict in favor of the plaintiff, directed by the court.

*J. T. Pingree*, for the defendant.

*J. R. Cow*, for the plaintiff.

TALCOTT, J.:

This is a motion for a new trial, on behalf of the defendant, on exceptions taken at the Cayuga Circuit and ordered to be heard at the General Term in the first instance.

The action was in replevin for the wrongful detention of certain railroad iron and a quantity of ties laid down, and constituting a railroad track leading from the main track of what was lately the Cayuga Lake Railroad Company, now belonging to the plaintiff. The said side track is about eighty rods long and was laid upon and across land belonging to Mrs. Winegar and led to a stone quarry situated on Mrs. Winegar's land.

One Hawley was the lessee from Mrs. Winegar of the premises on which the side track was laid, and the side track was laid by the Cayuga Lake Railroad Company, the predecessors in title of the plaintiff, by and under an agreement between that company and Hawley, the lessee of Mrs. Winegar. The railroad company wished to procure loose stones and dirt for the purposes of the railroad from the said quarry. Hawley had taken a lease of the premises for the term of five years from September 3, 1873, at the annual rent of \$500, and it was then agreed between Hawley and the railroad company, by parol, to the effect that the company was to lay this track to the quarry and to have the earth and loose stones down

to the building stone, and were to send their cars into the quarry by means of the side track and take out what they wanted, and in consideration thereof the company agreed to pay \$100 per year of the annual rent due by Hawley's lease, and if Hawley loaded the cars for the company it was to pay him certain rates for so doing.

The Cayuga Lake Railroad Company, under the said parol agreement, laid down the side track which, by the parol agreement, Hawley was to use in shipping building stone from the quarry. The agreement was to continue during the term of Hawley's lease. Whether the Cayuga Lake Railroad Company had ever availed itself of the privilege of taking out the loose earth and stone, or whether that company ever paid any thing on the rent of \$100 per year, did not appear. The Cayuga Lake Railroad Company and all its lands and premises, rights of way, side track, branches, turnouts, etc., owned by the company on December 6, 1872, or to be thereafter constructed, erected or acquired, in any way connected with, or appurtenant to, the said railroad track, was sold on the foreclosure of a second mortgage and purchased by one James Stillman, to whom the referee, who made the sale, conveyed on the 29th of August, 1874, and Stillman conveyed to the plaintiffs. In the meantime Hawley, by parol, transferred his lease by parol to the defendant Niles, who had been a partner with Hawley in working the quarry.

The new company (the plaintiff) by its president, agreed by parol with Niles, that the arrangement should continue at the same price of \$100 per year, and went in and took out the dirt and loose stones, and paid Niles for what cars he loaded at the rates which had been agreed on — and paid also fifty dollars on account of the rent. In 1875, the superintendent of the plaintiff's road was desirous of removing the said rails and ties composing the said side track, but was forbidden and prevented by Niles, the defendant.

On this appeal, the defendant's counsel presents two points, which arose on his motion for a nonsuit, and to the ruling of the justice at the Circuit :

First. That the contract was not void by the statute of frauds.

Second. That if void then the placing of the side tracks on the premises was a trespass, and the said rails and ties became fixtures, for which, therefore, this action would not lie.

We think the contract was void at law under the statute of frauds, as being an agreement for an easement, whereby, if valid, the premises, so far as the leasehold interest for five years was concerned, became the servient tenement.

The statute is, that no estate or interest in lands, or any trust or power, over or concerning lands, or in any manner relating thereto, shall be created, granted or assigned, etc., unless by act or operation of law or by a deed of conveyance.

We think, also, the contract was void as not to be performed within a year. (*Pitkin v. The Long Island Railroad Company*, 2 Barb. Ch., 221; *Day v. The New York Central Railroad Co.*, 31 Barb., 548.)

We think, also, that the rails and ties so laid down, did not become fixtures, for the intent was that they were to be placed there for a temporary purpose and the consent of the lessee, though void as a contract, inured as a license and prevented the act from being a trespass. The receipt of the fifty dollars on account of rent, was conclusive evidence of the consent of the lessee to the occupation of the premises by the side track, and judgment should be ordered for the plaintiff on the verdict.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

New trial denied and judgment ordered for the plaintiff on the verdict.

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MICHAEL HENNESSY, JR., APPELLANT, v. DENNIS  
CONNOLLY, RESPONDENT.

*Policemen — power of, to arrest for violating city ordinance.*

A policeman has no authority to arrest, without a warrant, a person violating a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordinance is accompanied by a breach of the peace.

*Butolph v. Blust* (5 Lans., 84) distinguished.

APPEAL from a judgment in favor of the defendant, entered upon the verdict of a jury, and from an order made at the Special Term denying a motion for a new trial made upon a case and exceptions.

*S. A. Webb*, for the appellant.

*N. W. Nutting*, for the respondent.

TALCOTT, J.:

This is an appeal from a judgment for the defendant, rendered on a verdict at the Oswego Circuit, and from an order of the Special Term denying a new trial. The action was for assault and battery and false imprisonment. The defendant was a policeman of the city of Oswego, and arrested the plaintiff on view and without warrant, on the charge of violating an ordinance of the city, which is as follows, viz.: "Section 8. The bridge across the Oswego river in this city, on the line of Bridge street, shall be kept and reserved free from all obstructions, and all groups and assemblages of persons thereon at any time are strictly prohibited. No person or persons shall sit or stand on said bridge or any railing thereof or occupy the same so as in any manner to obstruct the free passage thereof, or to hinder, molest or annoy any person in passing along the same; and no person shall peddle any fruits, nuts or other articles or things thereon. Whoever shall violate any provision of this section shall forfeit a penalty of five dollars for each and every offense."

By the charter of the city of Oswego, title 3, section 8 (Sess. Laws of 1860, ch. 463), the penalty for a violation of such an ordinance is to be collected before a justice of the peace, or other court, and the first process may be by civil warrant or summons.

The justice at the Circuit instructed the jury that the plaintiff was violating a city ordinance in regard to the bridge, and if he did not desist at the command of the officer then the officer had a right to arrest him without any process.

We find nothing, and are referred to no section in the charter of the city of Oswego, providing that a policeman may arrest without warrant and simply on view, for the violation of a city ordinance. It is not like the charter of Syracuse, which was examined by this



court in this respect in *Butolph v. Blust* (5 Lansing, 84); and it was found in that charter the power was expressly conferred on a policeman of the city to arrest, detain and take before the police justice, any person whom he shall find committing a violation of any ordinance of the city.

Admitting the obstruction of the bridge to have been a misdemeanor, the policeman had no authority to arrest the defendant unless such misdemeanor was accompanied by a breach of the peace at common law. (*Butolph v. Blust, supra.*) There was some evidence tending to show a breach of the peace by the plaintiff, preliminary to the arrest, and that the conduct of the plaintiff was reprehensible in the extreme, but the difficulty with the charge excepted to is, that it was not in any manner qualified; and the jury was instructed generally that if the plaintiff was violating a city ordinance and did not desist on demand, the policeman had a right to arrest him without warrant.

It may be that a policeman should have authority to arrest without warrant, and on view, any person engaged in the violation of a city ordinance, and we presume this authority is conferred by most city charters, but it is a matter which rests with the legislature, and until the power is conferred, an arrest by a constable without warrant, in case of a misdemeanor, can only take place where it is accompanied by a breach of the peace. (1 Chitty's Crim. Law, 13; *Carpenter v. Mills*, 29 How. Pr. R., 473.)

For the reason that the jury, under the instruction given them, cannot be deemed to have found a breach of the peace, the judgment and order denying a new trial must be reversed.

Present — MULLIN, P. J., TALLOTT and SMITH, JJ.

Judgment and order reversed and new trial granted, costs to abide the event.

MORTIMER P. WORTHY, AS ASSIGNEE OF DUDLEY W. CASE, PLAINTIFF, v. DAVID V. BENHAM, SHERIFF OF ONTARIO COUNTY, DEFENDANT.

*General assignment—failure of assignee to give bond—effect of—chap. 348 of 1860 and chap. 56 of 1875.*

Under the provisions of chapter 348 of 1860, as amended by chapter 56 of 1875, relating to general assignments, the failure of the assignee to enter into the bond within the time thereby prescribed does not invalidate the assignment. The statute simply prohibits him from selling the assigned property or converting it to the purposes of the trust until he shall have entered into such bond.

MOTION for a new trial on a case and exceptions ordered to be heard in the first instance at the General Term, after a nonsuit directed by the court.

*Metcalf & Field*, for the plaintiff.

*Edwin Hicks*, for the defendant.

TALCOTT, J. :

This is a motion for a new trial after a nonsuit at the Ontario Circuit, upon exceptions ordered to be heard at the General Term in the first instance. The action is for taking and detaining 6,000 hoop poles.

The plaintiff claims as the assignee of one Dudley W. Case under an assignment for the benefit of creditors ratably and without giving preferences. The assignment was dated and acknowledged the 25th day of September, in the year 1876. Case made a schedule and inventory of the assigned property, pursuant to section 2 of chapter 348 of the Laws of 1860. No question was made as to the form or contents of the said schedule and inventory. The schedule and inventory were duly verified by Case on the 19th day of October, 1876, and delivered to the county judge on the 28th of October, 1876, and filed in the office of the county clerk on the 30th of October, 1876.

The defendant justifies the taking and detaining of the goods, as sheriff of Ontario county, by virtue of an execution in favor of one Edwin Bond on a judgment against the assignor, Case, recovered in February, 1877. The defendant alleged in his answer that the said assignment was made and accepted with intent to hinder, delay and defraud the creditors of said Case. On the trial he gave no evidence tending to impeach the validity of the assignment, except by proving that the bond required by the statute of 1860 was not approved by the county judge or filed till the 4th of December, in the year 1876. The justice at the Circuit ordered the plaintiff to be nonsuited, relying on the case of *Juliand v. Rathbone* (39 N. Y., 369).

We think the Circuit judge erred in directing the nonsuit. The Court of Appeals held, in *Juliand v. Rathbone*, that the neglect to file the inventory and schedule within the time prescribed rendered the assignment void; and afterwards the legislature, by the act of 1874, chapter 600, enacted that if the assignor omits or refuses to make and deliver the inventory or schedule and affidavit, as in the act specified, "the assignment shall not, for such reason, become invalid or be ineffectual." This alteration of the statute the Court of Appeals, in *The Produce Bank v. Morton* (52 How. Pr. R., 157), recognizes as an abrogation of the rule laid down by the court in *Juliand v. Rathbone* (*supra*). By the act of 1875, the statute of 1860 was still further amended by providing that the assignee, in any such assignment, shall, within ten days after the delivery to the county judge of the inventory and schedule, and before he shall have power or authority to sell, dispose of or convert to the purposes of the trust any of the assigned property, enter into a bond, etc. The statutory provision on this subject seems to intend, not that a failure to enter into the bond within the ten days shall have the effect to avoid the assignment, but to prohibit the assignee from selling the assigned property, or converting it to the purposes of the trust, until he shall have entered into such bond. Such seems to be the view the courts have taken of that provision since the case of *Juliand v. Rathbone*.

The Court of Appeals, in *Thrasher v. Bentley* (59 N. Y., 649; S. C. more fully reported in 1 Abbott's New Cases, 39), holds, that even the entire invalidity of the bond does not affect the validity

of the assignment. See, also, a decision to the same effect in the first department. (*Von Hein v. Elkus*, 8 Hun, 516.)

The nonsuit is set aside and a new trial ordered, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Nonsuit set aside and new trial ordered, costs to abide event.

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SAMUEL KOPELOWICH, APPELLANT, v. WILLIAM  
KERSBURG, RESPONDENT.

*Order of arrest — Rule 6 of 1874 — what a sufficient compliance with.*

It is a sufficient compliance with Rule 6 of the Rules of 1874, requiring the sheriff to file with the clerk the order of arrest and affidavits on which it was granted, and directing that a copy of the rule be indorsed on the order of arrest before its delivery to the sheriff, if the substance of the rule be indorsed upon the outside of the original papers given to the sheriff, although such indorsement be omitted from the copy of the papers served upon the person arrested.

APPEAL from an order made at the Special Term setting aside an order of arrest.

*Chamberlain & Knapp*, for the appellant.

*Fuller & Vann*, for the respondent.

TALCOTT, J. :

This is an appeal from an order of the Onondaga Special Term made in May, 1877, setting aside an order of arrest granted in the action in March, 1877, with costs.

The order setting aside the order of arrest was granted, apparently, as appears from the memorandum of the justice, upon the ground that a copy of the sixth rule was not indorsed. It appears by the stipulation in the case, that no question was made as to the sufficiency of the affidavits on which the order of arrest was made. The affidavits and the order were so attached that when the papers were folded, the back of one of the affidavits formed the outside of the

package, and upon the outside of the original papers was indorsed a direction to the sheriff, containing the substance of the sixth rule, but no such notice or direction was indorsed on the copies served.

The justice at Special Term followed the case of *Dent v. Watkins* (49 How. P. R., 275), expressly reserving his own opinion. The case of *Dent v. Watkins* was decided by the Superior Court of New York, and holds that a copy of the indorsement must be served. We have to say about this, that the Rule 6\* does not require by its terms any copy of the indorsement to be served, and as this is a mere technical objection, we think the rule is fully satisfied by complying with its terms.

In *Barker v. Cook* (25 How. Pr. R., 190), approved by the Court of Appeals, it was held that it was not necessary in serving copies of papers required to be served, to serve copies of the signature or jurat.

It was held by Mr. Justice HENDERSON, in *Forward v. French* (52 How., 88), that the said Rule 6 was without authority, as being in conflict with section 183 of the Code of Procedure, which provides that the order of arrest shall direct the sheriff to return the order "to the plaintiff or attorney by whom it shall be subscribed or indorsed." However this may be, it seems to us that the rule cannot be stretched beyond its terms.

In the new "Code of Civil Procedure" section 561, it is provided that the order of arrest shall require the sheriff "to return the order with his proceedings thereunder, as prescribed by law,"\* so that it is not perhaps important at this day to determine whether Rule 6th was in conflict with the Code of Procedure or not, as we think the order setting aside the order of arrest should be reversed, because we think the indorsement in this case, substantially complied with the rule.

Order appealed from reversed, without costs of appeal to either party.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Order appealed from reversed, without costs to either party.

\* Rule 6 of 1874 was omitted from the rules of 1877, and the whole matter is now regulated by sections 577 and 590 of the Code of Civil Procedure.—[Rep.]

HORACE WEBSTER AND CHARLES W. LAWRENCE,  
RESPONDENTS, v. JAMES P. BAINBRIDGE, APPELLANT.

*Order striking out an answer as frivolous — appealable — A note, in order to have the effect of extending the time of payment of a past debt, must be negotiable.*

In an action to recover for liquors sold to the defendant, the defendant set up that the plaintiff had accepted the defendant's promissory note for the amount due, whereby the time for the payment of the debt was extended, and that such note was not yet due.

*Held*, that as the answer did not allege that the note so accepted was a negotiable note, it was properly overruled as frivolous.

An order striking out an answer as frivolous is appealable.

APPEAL from an order striking out an answer herein as frivolous, and directing judgment for the plaintiffs for the relief demanded in the complaint, with costs. These actions, two in number, were brought to recover for liquors sold to the defendant by the plaintiffs, the original term of credit for which had expired. The only defense set up in the answer was that the time of payment had been extended. In one action the answer alleged "that in pursuance of an agreement the defendant made and gave to the said plaintiff *his promissory notes*, which the said agent then and there received and accepted in settlement of said indebtedness, and the defendant alleges that neither of said notes has yet matured or become due, or any part thereof," and in the other that "they took from the said defendant *his note* for such amount, payable June 16, 1877, which they have ever since retained, and which they never offered to release to the defendant until this suit was brought; and thus, defendant alleges, that said indebtedness of this defendant was thus arranged, and that said note has not yet matured or become due, or any part thereof."

A motion was made to dismiss the appeal, on the ground that the order was not appealable.

*Wm. E. Edmonds*, for the appellant.

*Nathaniel Foote*, for the respondents.

TALCOTT, J. :

We think the appeal in this case is properly brought from the order to strike out the answer of the defendant as frivolous, otherwise the defendants seem to be remediless, as when the answer is struck out as frivolous, it no longer appears upon the record, and the judgment is entered up in form, as for want of an answer. (*Briggs et al. v. Bergen*, 23 N. Y., 162; *The J. Dixon Crucible Co. v. The New York Steel Works*, 57 Barb., 447.) Consequently the motion to dismiss the appeal must be denied.

As to the merits of the order striking out the defendants' order as frivolous, the answer does not purport to set up any defense to the action, except that the plaintiffs, through their agent, accepted the promissory note of the defendants, whereby the time for the payment of the debt was extended. It seems that the acceptance of a negotiable note of the debtor operates to suspend the cause of action until the maturity of the note, but if the note be not negotiable it is otherwise. (*Geller v. Seixas*, 4 Abb., 103; *Hughes v. Wheeler*, 8 Cow., 77; *Raymond v. Merchant*, 3 id., 147.)

The answer in this case does not aver the note given for the extended credit to have been negotiable; and the plaintiffs in their complaint allege that they are still the owners and holders of the notes given on the extension, and that they are ready and willing to surrender the same to the defendant. (*Cole v. Sackett*, 1 Hill, 516; *Hill v. Beebe*, 13 N. Y., 556.)

The result is, that the motion to dismiss the appeal must be denied, and the order appealed from affirmed, with ten dollars costs and disbursements.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Motion to dismiss appeal denied; order appealed from affirmed, with ten dollars costs and disbursements in two cases.

## SYLVESTER TRIMMER, RESPONDENT, v. ZACHARIAH TRIMMER, APPELLANT.

*Evidence — res gesta — what statements do not constitute part of.*

This action was brought to recover the amount alleged to be due to the plaintiff upon a sale of certain real estate made by his assignor to the defendant. Upon the trial the person who drew the deed was called as a witness and stated, against the defendant's objection and exception, that the grantor, at the time he was executing the deed (the grantee not being present) stated to the witness that the purchase-price had not been paid, but that the grantee had promised to pay it whenever he should be requested so to do.

*Held*, that the statement did not constitute a part of the *res gesta*, and should have been excluded. (TALCOTT, J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought to recover the purchase-price of certain land sold and conveyed to the defendant by Leonard Trimmer, the plaintiff's assignor. The referee found, upon conflicting testimony, that a portion of the price had been paid, and he reported in favor of the plaintiff for the remainder.

A. J. Wilkin, for the appellant.

G. E. Ripson, for the respondent.

SMITH, J.:

The only questions in this case deserving consideration are presented by exceptions to certain rulings of the referee, admitting testimony offered by the plaintiff.

The testimony of the plaintiff's witness, Losee, as to declarations made by the defendant's son William, was received conditionally, on the statement of the plaintiff's counsel, that he expected to show that William was acting, at the time, as the agent of the defendant. That expectation was not realized. There was no evidence in the case that the defendant authorized his son to procure a deed to be drawn. The bare fact of his subsequent acceptance of the



deed is no evidence of a prior authorization, nor does it appear that he accepted with knowledge of his son's declarations. Besides, the defendant and his son testified that the latter had no authority from his father to procure the deed. The testimony was, therefore, improperly received, but as the whole case is before us, and not the exceptions, alone, it is proper to inquire whether the testimony in question prejudiced the defendant. (*Crary v. Sprague*, 12 Wend., 41; *Beebe v. Bull*, id., 504; *Cameron v. Irwin*, 5 Hill, 272; *Watson v. Campbell*, 38 N. Y., 153; *Porter v. Ruckman*, id., 210.) The declarations testified to had no possible bearing on the question of payment, which was the only issue in the case. The testimony of Losee, that the son told him he need not be particular to read the deed to the old man (the plaintiff's assignor), if uncontradicted, may have affected the credit of the son, who was afterwards called as a witness for the defendant, but to make it admissible for that purpose it was not necessary to show that the son had authority to act for his father, and the attention of William was called to it when he was on the stand, and he fully contradicted it. On the whole, were this the only testimony the admissibility of which is questioned, I should hardly be prepared to say that it constitutes a substantial ground for reversal.

But another item of testimony elicited by the plaintiff's counsel, from the witness Losee, presents a more serious question. The witness was permitted to testify, in the face of an objection, that when the old man (Leonard Trimmer) executed the deed, he said to the witness that he had not got his pay for the land, but Zachariah had agreed to pay him when he wanted it. It did not appear that the defendant or his son William was present at the time when the declaration was made. The plaintiff's counsel claims that the declaration was a part of the *res gestæ*; not so, it was merely a casual conversation between the grantor and the scrivener, having no necessary connection with the act of signing or delivering the deed, and no legitimate tendency to characterize or qualify the deed, in the face of the written declaration contained in it that the consideration was paid. The *res gestæ* were the transactions between the parties to the deed; and the words which passed casually between the grantor and the scrivener, who in no way represented the grantee, were no part of them. The testimony was clearly

inadmissible. Was it prejudicial to the defendant? It could hardly have been otherwise; it bore directly upon the very point in controversy, and although the grantor was afterwards called as a witness and gave testimony of the same import as his declarations, yet it is impossible to say that his testimony did not, in the judgment of the referee, derive credit and corroboration from the declarations themselves. We see no way of avoiding the conclusion that the reception of this item of evidence was erroneous.

Judgment reversed and a new trial ordered before another referee, with costs to abide the event.

MULLIN, P. J., concurred.

TALCOTT, J. (dissenting):

This action is to recover the price unpaid on the conveyance of thirty-six acres of land by Leonard Trimmer, the father of both parties, to the defendant. The claim was subsequently assigned to the plaintiff in the action. The appellant presents for consideration several exceptions to the admission and rejection of evidence.

The production of the deed, which, in the usual form, acknowledged the payment of the purchase-price, *prima facie* establishes the fact of such payment; and although the referee says, in one part of his opinion, that the burthen of proving payment rests on the defendant, I do not understand him as asserting this as an abstract principle of the law of evidence, but only as applicable to the facts proved in this case, the grantor having, as a witness, denied that any payment on account of the purchase-money was made at the time of the conveyance, but claiming that the defendant was to pay the purchase-price afterward, at such times as the grantor should need the money; and the defendant himself, not controverting this statement, but claiming that he had made full payment afterward from time to time, by applying indebtedness due from the grantor to him on various accounts, so that, in my opinion, the referee is to be understood that, on the facts and concessions in the case, it must be assumed that the acknowledgment of payment contained in the deed was not, in point of fact, true as indicating that any payment was made at the time of the conveyance.

In general the consideration clause of a deed is not within the

rule excluding parol evidence to contradict a writing. (*Adams v. Hull*, 2 Denio, 306; *Whitbeck v. Whitbeck*, 9 Cow., 266; *Shephard v. Little*, 14 Johns., 210; *Witbeck v. Waine*, 16 N. Y., 538.)

It seems that a deed had been drawn up by one Borst for the purpose of conveying the land in question, the description contained in which was not clear and satisfactory, and therefore William E. Trimmer, a son of the defendant, applied to one Losee to draw another deed, with a different and more perfect description of the premises intended by the grantor to be conveyed. Losee, as a witness, was inquired of by the plaintiff's counsel as to what was stated by William E. Trimmer, when he applied to the witness to have the new deed drawn. To this question the counsel for the defendant objected, on the ground that the evidence called for was immaterial, and that William was not shown to be the agent of the defendant. The referee overruled the objection on the ground assumed by the plaintiff's counsel, that the plaintiff expected to show that William was acting as the agent of the defendant. The objection, therefore, merely went to the order of proof, and if the plaintiff afterward failed to make proof of the agency, it was incumbent on the defendant, if he intended to rely on this objection, to move to strike out so much of the testimony as related to what the supposed agent had said to Losee. But, moreover, the evidence objected to was wholly immaterial to any issues in the action, and could not have, in any way, affected the conclusions of the referee, or any issue presented by the case.

The witness Losee further stated, in the course of his examination, that when the grantor and his wife *executed and acknowledged* the deed, "I said to the old man (the grantor) you are deeding away about the last piece of property you have got; have you got your pay for it?" He said, "No, but Zachariah had agreed to pay him when he wanted it." To this testimony the defendant objected, and on the objection being overruled took an exception.

My brethren differ with me as to the admissibility of this evidence, and think a new trial should be ordered in consequence of the ruling of the referee, whereby the testimony was held admissible.

I think the declaration of the executor made at the time of executing and acknowledging the deed, as to whether the consideration mentioned in the deed had been paid, and that an arrangement

had been made for the payment thereof, in future, was plainly a part of the *res gestæ* and admissible as a declaration accompanying an act, and as tending to counteract the effect of the evidence of payment afforded by the formal acknowledgment of the payment of the consideration contained in the deed which he was then in the act of executing and acknowledging. The same witness was subsequently asked, "Did you at the time measure off the land described in the Borst deed drawn by you?" This the plaintiff's counsel objected to as immaterial. The testimony of the witness upon this subject could have had no bearing upon any issue in the case. There was no controversy about the quantity of land conveyed in the deed which was finally executed, and the testimony was wholly irrelevant. The testimony of the defendant as to whether he had received any thing from Eliphalet's estate, by the hands of the grantor, was simply explanatory of testimony which had been given by other witnesses, as to the distribution which had been made of the estate of a deceased brother, and was wholly immaterial to any issue in the action. The questions of fact decided by the referee were as to the amount which should be allowed to the defendant as payments toward the purchase-price of the land conveyed, and I think, so far as we are able to see, on the vague and conflicting evidence, the findings of the referee were quite as favorable as could be justified under the answer of the defendant; and on the whole case I think the judgment should be affirmed. But as my brethren differ with me as to the admissibility of the evidence of Losee as to the declarations of the grantor made at the time of the execution and acknowledgment of the deed, and are of the opinion that for the admission of that testimony, the judgment should be reversed and a new trial ordered, it must be reversed accordingly.

Judgment reversed and new trial ordered before another referee, costs to abide event.

ELIZABETH SALTER, ADMINISTRATRIX, ETC., OF FREDERICK E. SALTER, DECEASED, RESPONDENT, v. THE UTICA AND BLACK RIVER RAILROAD COMPANY, APPELLANT.

*Action for negligence — Railroad crossing — duty of one passing over.*

The plaintiff's intestate was struck by one of defendant's engines and killed, while driving a team of horses across one of its tracks. Upon the trial counsel for the defendant requested the court to charge that it was negligence on the part of the intestate, if he approached the crossing at such a rate of speed as to be unable to stop or turn his horses aside before going on to the track. The court charged, "that if the intestate approached the track at such speed that he was unable to control or stop his team, without making any effort to apprehend the approach of the train," he was guilty of negligence.

*Held*, that the charge as requested was properly refused, and that as modified it was as favorable to defendant as it was entitled to, except that it was the duty of the plaintiff's intestate to make such effort as was reasonable under the circumstances to ascertain if a train was approaching. (MULLIN, P. J., dissenting.)

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*F. Kernan*, for the appellant.

*F. W. Hubbard*, for the respondent.

SMITH, J. :

The defendant's counsel requested the court to charge the jury, without qualification, that if the plaintiff's intestate approached the crossing at such speed as to be unable to stop or turn his horses aside, before going on the track, he was negligent.

The presiding justice thinks the refusal was error, and that for that reason the judgment should be reversed and a new trial ordered.

I am unable to concur in that opinion; I think the refusal of the court to charge in the exact terms of the request was correct. It depended upon certain questions of fact, which the jury were to decide upon evidence in some respects conflicting, and from which

different conclusions might be drawn, whether the deceased was negligent in driving towards the crossing in the manner stated in the request. If the approaching train was not in sight or hearing, or if, with the exercise of due care and attention, the deceased was not aware of its approach, there was nothing in the speed or manner of his driving which the law can pronounce negligence *per se*. The questions whether he omitted to look and listen, or whether, having looked and listened, he failed, without fault on his part, to see or hear the coming train, were for the jury.

The court instructed the jury, in reply to the request, that if the intestate approached the track at such speed that he was unable to control or stop his team, without making any effort to apprehend the approach of the train, he was guilty of negligence. The defendant's counsel excepted, on the ground that the charge was not exactly as requested. The charge was quite as favorable to the defendants as they were entitled to, except that it, in effect, treated the intestate as free from negligence, if he made any effort, however slight, to ascertain whether a train was approaching, whereas, he was required to make such effort as was reasonable in the circumstances of the case. That point, however, was not suggested by the exceptions taken, and the defendants cannot now avail themselves of it.

I think the case was well tried and that the judgment should be affirmed.

TALCOTT, J., concurred.

MULLIN, P. J. (dissenting):

The learned judge who tried this cause at the circuit conformed to the views of the Court of Appeals, upon the appeal to that court as set forth in the opinion of FOLGER, J., and there is, therefore, no propriety in considering them on this appeal. We shall consider only a few of the exceptions of the defendant's counsel to the charge of the judge.

The defendant's counsel moved for a new trial on the judge's minutes, and he appeals from the order refusing such motion. The defendant has the right on the appeal from the order to present the question, that all or any of the findings of fact are against the weight of the evidence or without any evidence to support them.

FOLGER, J., in his opinion, has examined *seriatim* all the material questions of fact that were proved on the former trial, and the evidence in the case now before us is substantially the same as was given on the former trial, and he arrived at the conclusion that the findings were justified by the evidence and the facts properly submitted to the jury, and that the jury and not the court was the proper tribunal to decide them.

I am free to say, that I am not as well satisfied as I would wish to be, that the intestate was free from contributory negligence, and yet, I cannot say that the finding on that point is without evidence to support it, or so decidedly against the weight of evidence as that it is the duty of the court to set the verdict aside in view of the opinion of the Court of Appeals.

The defendant's counsel requested the court to charge the jury that it was negligence on the part of the intestate if he approached the crossing at such speed as to be unable to stop or turn his horses aside, before actually going on to the track. The judge, in reply, said if he had any apprehension of the approach of the train. The counsel requested the judge to charge as requested, without any qualification. The court then said if he approached the train at such speed as that he was unable to control his team or stop it, without making an effort to apprehend the approach of the train, he was guilty of negligence. The defendant's counsel excepted to the omission to charge exactly as requested. The court then asked the counsel to read his proposition again and he read as follows: "I ask your honor to charge that it was negligence on the part of the deceased if he approached this crossing at such speed as to be unable to stop or turn his horses aside before actually on the track—such a speed that he could not stop within twenty-five feet." The court in answer said he charged that with the additional suggestion he had made, which was that driving at the speed mentioned in the request was negligence, if the intestate had any apprehension of the approach of the train. To this the defendant's counsel excepted.

The facts necessary to a proper understanding of the charge made and the refusal to charge as defendant's counsel requested are in brief as follows, viz.:

On the day of the accident the deceased was drawing logs on bob-

sleds to a saw-mill in Carthage, and to reach it he was obliged to cross defendant's track. To reach the track he drove down Furnace street. At the upper end of the street there is a hill having a descent of some nineteen feet in the space of some 200 feet; from the foot of the hill to the railroad crossing there is a slight descent, but the road is nearly level. The day was cold and the road slippery. There are two places between the foot of the hill and the crossing at which a train might be seen on the track, and at a point twenty-five feet from the track a train might be seen at any point between the railroad bridge that crosses Black river at the distance of 1,225 feet and the crossing on Furnace street. The defendant went down the hill on a trot, and after getting to the foot of it he struck his horses with his whip, and this caused them to move faster and without stopping he drove on to the track; the horses had crossed over and just as the engine struck the sleds he raised his arms and jumped off, on or at the edge of the track, and was struck and killed. It was a cold day and the deceased had on a cap with earlaps over his ears and a woollen comforter round his neck. He had been drawing logs across the track at the same place for several days. The train, on the morning of the accident, was some fifteen minutes behind its usual time.

It is manifest from these facts, that had the deceased looked toward the bridge when he was twenty-five feet from the crossing he would have seen the train at the bridge some 1,225 feet from the crossing. The train must have been less than that distance from him, or if it was moving at the speed of twenty miles per hour, it would take it thirty-four seconds to pass over that space, and it could not require that length of time for the horses to move thirty feet, which would be the distance of the west rail of the track from a point twenty-five feet east of the track. If, then, he might have seen the train in time to avoid the collision, but his horses were going at such a rate of speed that he could neither stop nor turn them from the track, it was manifest carelessness and the court should have so charged.

To allow parties approaching a railroad crossing to regulate their action in crossing, by their knowledge of the time for the passage of trains, would be a most mischievous regulation in its operation upon railroad companies as well as upon travelers and others on the



highways. So long as railroad companies have the right to run trains on their road at their own pleasure, those who cross them must see to it, that not only is the track clear, but that there is no train in sight or hearing that can interfere with them in crossing. The time table furnishes no evidence that trains are not in motion and approaching the crossing.

I am of the opinion that the defendant was entitled to have the proposition contained in his request charged without the modification made by the court. Because of the refusal so to charge, the judgment should be reversed and a new trial granted, costs to abide event.

Judgment and order affirmed.

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SAMUEL F. V. WHITED, RESPONDENT, v. THE GERMANIA  
FIRE INSURANCE COMPANY, APPELLANT.

*Policy of insurance — condition of — power of agent to waive.*

The defendant issued to the plaintiff a policy of insurance upon a frame building owned by him, the policy providing that it should be void if any change or transfer in title or possession should take place without the consent of the company indorsed upon the policy, or if the interest of the assured, as owner, mortgagee, devisee, or otherwise, was not truly represented to the company and stated in the policy; it also provided that the use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and indorsed on it, should not be construed as a waiver of any printed or written conditions. The plaintiff sold the house and took back a purchase-money mortgage. The defendant's agent thereafter received the annual premium from and gave a receipt therefor to him, being aware of these facts and understanding that he intended to insure his interest as mortgagee.

*Held*, that in an action on the policy the jury might infer an agreement by the agent to insure plaintiff's interest as mortgagee, and a waiver of the requirement that the plaintiff's interest, as mortgagee, should be endorsed on the policy.

The agent was authorized to solicit insurance, issue and renew policies, note the changing of title, and to collect and pay premiums.

*Held*, that this evidence justified the conclusion that the agent had authority to waive, and by his acts had waived the condition above referred to, and that plaintiff was entitled to recover.

APPEAL from judgment in favor of the plaintiff entered on a verdict rendered at the Oswego Circuit, before Mr. Justice MORGAN.

Action on a policy of insurance for \$700, issued by defendant to plaintiff, on a frame building occupied as a dwelling and grocery. The policy was issued October 11, 1869, and was continued in force by annual renewals till October 11, 1873. The policy contained the following conditions: "If the property be sold or transferred, or any change takes place in title or possession, etc., \* \* \* without the consent of the company indorsed hereon, or if the interest of the assured in the property, whether as owner, \* \* \* mortgagee, lessee, or otherwise, be not truly stated in this policy, the policy shall be void." "If the interest of the assured in the property be any other than the entire, unconditional and sole ownership of the property, for the use and benefit of the assured, \* \* \* it must be so represented to the company and so expressed in the written part of this policy, otherwise this policy shall be void." "The use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and indorsed on this policy, shall not be construed as a waiver of any printed or written condition or restriction therein." When the policy was issued, the plaintiff was the owner of the premises, and the buildings insured were described in the policy as his. In December, 1870, the plaintiff agreed verbally, to sell the house and lot to John Donohue, and on November 17, 1871, in consummation of the agreement, he deeded the property to Donohue and took back a bond and mortgage thereon for \$1,500 purchase-money. No notice of the transfer, or of plaintiff's interest as mortgagee was stated in the policy, or indorsed on it. At the trial, the judge submitted to the jury, upon conflicting evidence, the question whether the local agent of the defendant, at Oswego, received from the plaintiff the renewal premium and paid it over to the company, after being notified by the plaintiff that he had deeded the property and taken a mortgage, and whether it was understood by the agent that the premium was paid by the plaintiff to renew the policy for his benefit as mortgagee. The jury found a verdict for the plaintiff for the amount of the policy, with interest from the time of the loss.

*John Chetwood*, for the appellant.

*W. A. Poucher*, for the respondent. The defendant's agent, at Oswego, had full power and authority to continue the insurance on the plaintiff's interest as mortgagee, either verbally or by making the indorsement of the change of title upon the policy, or to waive that condition of the policy requiring the indorsement and consent to the transfer verbally. (*Angell v. Hartford Fire Ins. Co.*, 59 N. Y., 171; *Pechner v. Phoenix Ins. Co.*, 65 id., 195; *Rhodes v. Railway Passenger Ins. Co.*, 5 Lans., 71; *Ellis v. Albany City Fire Ins. Co.*, 50 N. Y., 402; S. C. reported Gen. T., 4 Lans., 433; *Fish v. Liverpool, London and Globe Ins. Co.*, 44 N. Y., 538; *Trustees of First Baptist Church v. Brooklyn Fire Ins. Co.*, 19 id., 305; *Sheldon v. Atlantic Ins. Co.*, 26 id., 460; *Boehen v. Williamsburgh Ins. Co.*, 35 id., 131; *Pitney v. Glen's Falls Ins. Co.*, 65 id., 6; *Shearman v. Niagara Fire Ins. Co.*, 46 id., 526; *Pechner v. Phoenix Ins. Co.*, 6 Lans., 411; *Whitwell v. Putnam Ins. Co.*, 6 id., 166.) The condition in a written instrument not under seal, requiring an act to be performed or evidenced by a statement in writing, may be waived by parol, and a parol waiver of a similar condition of a sealed instrument may be upheld in equity on the theory of an equitable estoppel. (*Pitney v. Glen's Falls Ins. Co.*, 65 N. Y., 6.) The issuing and delivering to the plaintiff of the certificate on the 11th day of October, 1872, after notice of the change of his interest in the premises, and saying to him that it was all right, was in law an insurance of his mortgage interest and a waiver of the condition of the policy requiring it to be in writing and indorsed thereon. (*Pechner v. The Phoenix Ins. Co.*, 6 Lans., 411, 417; affirmed, 65 N. Y., 195; *Shearman v. Niagara Ins. Co.*, 46 id., 526; *Parker v. Arctic Fire Ins. Co.*, 1 N. Y. S. C. R. [T. & C.], 397; affirmed, 59 N. Y., 1.)

SMITH, J.:

The jury were instructed that if they should find from the evidence, that at the time when the renewal premium was paid to the defendant's agent, he was notified by the plaintiff of the conveyance and mortgage, and he understood that the plaintiff paid the money to renew the policy for his benefit as mortgagee, they might infer an agreement that it should be renewed for that purpose, and in that event they were further instructed, as is to be

inferred from the charge, that they might find for the plaintiff. The instruction was proper, in view of the evidence, provided the agent had power to waive the provisions in the policy requiring the interest of the assured, as mortgagee, to be stated in writing in the policy itself. The charge undoubtedly assumed the existence of such authority. That question, probably, should have been left to the jury, if it had been insisted on. (*Van Allen v. Farmers' Joint Stock Insurance Company*, 64 N. Y., 469.) But there was no exception to the charge, in that respect, or any other, and no request was made that the specific question of the agent's authority be submitted to the jury. The question was treated on all hands as one of law, or, if of fact, one which the parties submitted to the decision of the court. (S. C., 17 S. C. N. Y. [10 Hun], 397, 402.) The evidence fully warranted the conclusion that the agent had such authority. The agent, who was called as a witness by the defendant, testified that he was the local agent of the defendant at Oswego, and that as such agent he solicited insurance, issued and renewed policies, noted the changes of title upon policies, issued renewal certificates, collected premiums, and paid premiums to the company. That being the scope of his agency, it is clear that in the circumstances of the case, the conclusion was well warranted that he had authority to waive a compliance with the conditions referred to, and that the agreement to renew, which the jury must have found by their verdict, was valid and binding on the company. (*Whitwell v. Putnam Fire Insurance Company*, 6 Lans., 166, and cases there cited by MULLIN, J.; *Pechner v. Phoenix Ins. Co.*, id., 411; S. C. affirmed, 65 N. Y., 195; *Shearman v. Niagara Fire Ins. Co.*, 46 id., 526; *Pitney v. Glen's Falls Ins. Co.*, 65 id., 6.)

In the case of *Rohrbach v. Germania Fire Insurance Company* (62 N. Y., 47), cited by the appellant's counsel, the ruling of the court that notice to the agent, or his knowledge of facts, was immaterial and did not affect the company, was made in view of a provision in the policy, which constituted him the agent of the insured and not of the company. (Opinion of FOLGER, J., p. 62.) The policy in this case contains no such provision. The case of *Alexander v. The Germania Insurance Company* (MSS. op. of RAPALLO, J.) was upon a policy containing a provision like that in the case of *Rohrbach*.

Certain rulings upon questions put by the defendant's counsel were excepted to. The questions were improper, as they called for the conclusions of the witness on questions of law. It is unnecessary to refer to them more particularly.

The judgment should be affirmed.

MULLIN, P. J., and TALCOTT, J. concurred.

Judgment affirmed.

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FERDINAND S. HAHN, RESPONDENT, v. THE NORTH AMERICAN LIFE INSURANCE COMPANY, APPELLANT.

*Insurance company — contract for payment of agent of — construction of.*

This action was brought by the plaintiff, an insurance agent, to recover the amount due upon a contract made with him by the defendant, which provided that his compensation was to be a commission upon premiums paid to the company on policies procured by him. The contract further provided that said defendant "agrees to advance to the party of the second part (plaintiff), each month, the sum of \$175, in addition to the foregoing commissions, such allowance to be charged against his commission account." It also provided that the plaintiff might, upon repaying the sums advanced under the contract, receive an additional commission on premiums.

*Held*, that the monthly advances were to be received by the plaintiff absolutely, in addition to his commissions, and that the same were not to be repaid by him, unless he should elect so to do in order to receive the higher commission.

APPEAL from a judgment entered on the report of a referee.

This action was brought upon a contract to pay the plaintiff a specific compensation for his services as an agent of the defendant. The referee reported in favor of the plaintiff for the sum of \$405.52.

G. N. Kennedy, for the appellant.

W. C. Ruger, for the respondent.

SMITH, J. :

The plaintiff was employed by the defendant as general agent to solicit insurance and collect premiums. The agreement provided that his compensation was to be a certain commission on premiums paid to the company on all policies procured by him, to be paid to him as long as he should continue such agent, and to himself, his heirs or assigns, so long as the premiums should be paid to the company. The agreement contained the following clause, the construction of which is one of the contested points in the case: "The party of the first part" (defendant) "agrees to advance to the party of the second part, each month, the sum of \$175 in addition to the foregoing commissions, such allowance to be charged against his commission account." It was also agreed that at such time as the plaintiff might elect, he should receive, after paying the sums advanced on the contract, an additional commission on premiums, at certain rates specified in the contract. It was further provided that either party might cancel the contract at any time, by written notice to either party, after six months from its date.

The appellant's counsel insists the advances were intended as a loan to be repaid by the plaintiff. For the respondent it is contended, that they were to be paid to the plaintiff absolutely, in addition to his commissions, as compensation for his services. We incline to the opinion that they were intended as a payment, conditionally; that is to say, they were to belong to the plaintiff absolutely, unless he should elect to take a higher rate of commissions, as provided for by the contract, in which case he was to repay the advances. This construction seems reasonable; it gives effect to every part of the contract, and it accords with the practical interpretation put upon the contract by the parties themselves. The monthly payment was made regularly for five months and a-half, and charged by the defendants in the plaintiff's account. No provision was made in the contract for its repayment, except in case the plaintiff should elect to take the higher rate of commission. The arrangement seems to have proceeded on the idea that, in time, the business would increase to such an extent that the commissions at the greater rate proposed, would be a larger compensation than was first provided. In fact, however, the plaintiff did not avail himself of his right to elect, preferring evidently the old

rate of compensation. On the other hand, the defendants, unwilling to continue that rate, terminated the contract at the end of six months, and offered to enter into another, which discontinued the advance, but gave to the plaintiff commissions at rates equal in all respects to those which he had the privilege of electing to take under the first contract, and in one particular class of premiums, somewhat larger. The offer of the defendant to increase the rate of commissions is inconsistent with the idea that the advances under the first contract were a mere loan. The referee decided in accordance with the construction above indicated, and held correctly, that the plaintiff was entitled to recover the unpaid portion of the monthly stipend, accruing during the six months in which the original contract was in force.

The plaintiff also claimed and recovered for damages alleged to have been occasioned by the voluntary breach of the contract on the part of the defendant, in procuring policies obtained by the plaintiff to be transferred to other companies, or causing them to lapse, thus depriving the plaintiff of his right to commissions upon renewal premiums. The amount recovered on that ground, is \$466.38. On a careful examination of the testimony, we do not find any evidence that the defendant was instrumental in procuring any policy procured by the plaintiff, to be transferred or to become lapsed, except the two policies of Bernard Browner. The value of the commissions which the plaintiff was entitled to receive on the premiums payable on those two policies, according to the testimony, was \$159.50. The claim should be reduced to that amount. The result is, that after deducting the amount stipulated to be due to the defendant, the recovery should be only ninety-eight dollars and eighty four cents, with interest from the date of the report, July 26, 1876. If the plaintiff consents to reduce to that sum, the judgment so reduced is affirmed, with costs; otherwise it is reversed and a new trial ordered before another referee, costs to abide event.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly

EDWIN D. BARBER, APPELLANT, v. MAURICE STETTMEIER AND OTHERS, RESPONDENTS.

*Appeal to County Court — Return by justice — truthfulness of, cannot be questioned.*

Upon an appeal to the County Court from a judgment of a justice of the peace, the truthfulness of the justice's return, if it be fully responsive to the notice of appeal, cannot be questioned nor controverted by affidavits, nor can a further return, as to the truth of matters in respect to which the original return is controverted by affidavits, be required.

If the return be false, the remedy of the party aggrieved thereby is by an action against the justice.

APPEAL from a judgment of the Monroe County Court, reversing a judgment rendered by a justice of the peace in favor of the plaintiff.

The judgment was reversed by the County Court upon the ground that upon the day to which the cause had been adjourned, the justice held it open to the next morning indefinitely, in the absence of the defendant, the County Court holding that the action was thereby discontinued, and the justice lost jurisdiction.

*J. Van Voorhis*, for the appellant.

*E. Harris*, for the respondents.

SMITH, J.:

The only ground of irregularity specified in the notice of appeal to the County Court, was that the judgment of the justice was irregular in that the action was discontinued by the non-appearance of the plaintiff on the last adjourned day, at or within one hour from the time appointed, and the absence of the justice from his office at and before the expiration of the hour allowed by law. The object of requiring a specification in the notice of appeal, of the errors alleged, is that the adverse party and the justice, may be fairly apprised of the ground on which a reversal of the judgment is sought. (*Lee v. Schmidt*, 6 Abb., 183; *Williams v. Cunningham*, 2 Sandf., 632; *Thompson v. Hopper*, 1 Code R., 103.) That is



necessary to enable the justice to make a proper return (*Webster v. Hopkins*, 11 How. Pr. R., 140), and the respondent to prepare for argument, or procure an amended return, if the original return is defective as to any ground of appeal. (*Morton v. Clark*, id., 498.) In the present case, the justice returned fully to the specification above referred to, by stating that on the last adjourned day prior to that on which the case was tried (which was the 20th November), at 4 P. M., the parties again appeared, and at the request of the defendants the case was again held open to 4 P. M., on the twenty-first November, the plaintiff consenting, and that on said twenty-first at 4 P. M., the plaintiff appeared by his attorney, Quincey Van Voorhis, and the defendants did not appear. That the cause was then tried and judgment rendered for the plaintiff. The return having been made, the defendant's counsel filed affidavits controverting it in some particulars, and obtained an order of the County Court requiring the justice to amend his return by stating, specifically, as to the truth of the facts stated in said affidavits, so far as they controvert the said return, and particularly to state who appeared for the parties respectively on twentieth November. To that order the justice returned by stating that on the twentieth November, at 4 P. M., the justice was at his office, and Mr. Van Voorhis appeared a few minutes before or after that time, and stated that he did not want to wait, and the case was held open till the next morning, to avoid taking judgment against defendants by default. That the next morning Mr. Van Voorhis appeared, and Mr. Harris having been notified, as the justice was informed, declined to appear, and the justice then heard the testimony and rendered judgment. The judgment of the County Court was based upon the statements in the last return. Thus the anomaly was presented of two conflicting returns, the first of which, fully responding to the specification of error in the notice of appeal, showed the judgment before the justice to be regular, and the other, in the opinion of the County Court, showed the judgment to be irregular and void for want of jurisdiction. It appears from the opinion of the county judge, that he thought the amended return, so far as it was responsive to the order directing it, must be taken as true. Why the amended return, rather than the original return, which was responsive to the notice of appeal? No reason is, or can be given. The truth is, the dilemma in which the County

Court found itself, was the result of a clear irregularity in that court. It was irregular to entertain affidavits controverting the original return, and to require the justice to make a further return respecting the matters so controverted as to which his original return was full. The original return should have been taken as conclusive and acted on as true. If false, the remedy was by action. It has been so held in respect to returns to a writ of *certiorari*. (*Haines and ors. v. The Judges of Westchester*, 20 Wend., 625.) In *Rawson v. Adams* (17 Johns., 130), the rule was applied to the return of a justice upon an appeal to the County Court, under the statute (Laws 1813, ch. 94), as to the particulars which by statute he was required to return. If the return is defective, that is, if it does not fully respond to the specifications in the notice of appeal, it may be required to be amended. (Code, § 362.) But if it is fully responsive, its truthfulness cannot be questioned on the appeal. The contrary practice would lead to interminable controversy and confusion.

The order of the County Court directing an amended return, may be reviewed on this appeal. (Code, § 329.) We think it was irregular, so far as it called for a return as to the truth of the matters in respect to which the original return was controverted by the affidavits; that the amended return, so far as it was in conflict with the original return, should not have been considered by the court; and that as the original return showed that the judgment of the justice was regular, the judgment of the County Court reversing it was erroneous and should be reversed, together with the order for an amended return, and that of the justice affirmed.

If the appellant is prejudiced by this result, he has his remedy by action against the justice, in case his original return was false.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

LA MOTT THOMPSON v. LAURA S. TAYLOR, EXECUTRIX,  
ETC., OF JAMES B. TAYLOR, DECEASED.

IN THE MATTER OF THE CLAIM OF ORSAMUS B. MATTESON,  
FOR SERVICES ON SALE OF THE TIMES STOCK, AND AS ATTORNEY  
FOR THE RECEIVER, AND FOR INTEREST ON INTEREST PAID FOR  
RENEWING NOTE OF SAID TAYLOR.

*Appeal from order — only one appeal therefrom, or from part thereof allowed —  
Additional affidavits — cannot be read upon appeal.*

By an order of the Special Term, made upon an application for the confirmation of the report of a referee, two claims presented by one M. to the referee, and allowed by him, were disallowed. M. appealed from so much of the order as disallowed one of the said claims. Subsequently and after the decision of the said appeal, he brought this appeal from the portion of the order disallowing the second claim.

*Held*, that his right to appeal from the order was exhausted by the first appeal; and that the second appeal could not be maintained.

Affidavits, made after the making of an order at the Special Term, cannot be read upon the hearing at the General Term, even although all the parties to the appeal consent thereto.

APPEAL by Orsamus B. Matteson from an order of the Oneida Special Term.

*John D. Kernan*, for the appellant Matteson.

*Ward Hunt, Jr.*, for Levy, trustee of Day.

*Thomas S. Jones*, for H. W. Bentley, receiver.

SMITH, J.:

It appears from the papers submitted on this appeal, that at a Special Term held in Herkimer county, by Mr. Justice HARDIN, 22d February, 1876, an order was made in this action, continuing the receiver theretofore appointed, of the personal estate of said James B. Taylor, deceased, and appointing a referee to take an account and report what sum was due and unpaid to the plaintiff, and to each of the other creditors of the said deceased, who should come in, etc. The referee acted under the order and made his report, which the plaintiff moved to confirm, at a Special Term in Oneida,

before Mr. Justice MERWIN. The court made an order confirming said report in part, but disallowing certain claims that had been presented by the appellant Matteson, to the referee, and by him allowed. One of said claims was for "services on sale of the Times stock, and as attorney for the receiver, and for interest on interest paid for renewing notes of Taylor." The other was for "money paid and liability incurred in attempting to collect the notes of James B. Taylor, and by him indorsed, for his accommodation." This appeal is from that part of the order of the Special Term, which disallowed the first of the claims above stated.

Previously to bringing the present appeal, the claimant appealed from that part of the order of the Special Term, which disallowed the second claim above mentioned. That appeal was taken in September, 1876, and was argued before us at the last April term, and decided in June.

The time when the present appeal was brought does not appear. The notice of appeal contained in the printed case has no date. The certificate of the clerk, appended to his transcript of the record, is dated 20th September, 1877. The appeal is submitted to us upon what purports to be the evidence taken before the referee, and on which the Special Term acted, and in addition thereto, upon certain affidavits made since the order of the Special Term, and which were used, as is stated in the brief of the appellant's counsel, upon a subsequent application to modify that order. The brief also states that it is consented that the affidavits referred to may be used as a part of the testimony, and that this court may make additional findings based thereon.

Upon this state of facts, we think that the portion of the order now appealed from should be affirmed on several grounds:

1. We are of the opinion that the claimant's right to appeal from the order of the Special Term was exhausted by his first appeal. He then had an opportunity to appeal from the entire order, or so much of it as he was dissatisfied with, and he should then have availed himself of it. A piecemeal appeal from an order or judgment will not be allowed. The like objections exist to it as to the breaking up of a single cause of action, and bringing a separate suit upon each fragment. Even if all the parties consent to it, the court should refuse to sanction the practice, in order to prevent the wast-

ing of estates, in cases like this, in unnecessary litigation, as well as to relieve the calendars from appeals unnecessarily multiplied.

2. The counsel for the respective parties seem to have supposed that their consent would have the effect to bring before the court the affidavits made since the hearing at Special Term, and to call into exercise not only the appellate jurisdiction of the court, which is properly invoked by the appeal, but also a sort of original jurisdiction to be employed in sifting the affidavits and finding what facts they tend to establish. That is a misapprehension. On the hearing of appeals, the court will exercise only a strictly appellate jurisdiction, unless otherwise provided by statute. Appeals are to be heard on the same papers as were used below. Such was the rule in the late Court of Chancery, in this State, on an appeal from the decree of a vice-chancellor. (*Mitchell v. Lenox*, 14 Wend., 662; *Wendell v. Lewis*, 6 Paige, 233; *Studwell v. Palmer*, 5 id., 166; *Bloodgood v. Clark*, 4 id., 574.) The rule was the same in the court for the correction of errors, with respect to appeals from the chancellor. (*Deas v. Thorne*, 3 Johns. R., 543.) We cannot, therefore, consider the affidavits; aside from them, we think the evidence furnishes no ground for reversing the decision of the judge at Special Term, upon the questions involved in this appeal. We are of the opinion that the evidence which was before him, warranted the conclusion stated in his opinion, that the claimant was a volunteer, acting largely for his own interest as a creditor of the estate, and without such an employment from the receiver as gave him a legal claim on the estate for his services, and that the claim was properly disallowed on that ground.

3. While we do not entertain the affidavits, we have looked into them sufficiently to see that an adherence to the salutary rules above laid down, does no injustice to the appellant. The affidavits on his part are cumulative mainly, and are met and controverted to a great extent by that of the receiver; while they amplify the claimant's case, and present it more in detail than did the evidence taken before the referee, they do not materially vary it.

That part of the order appealed from should be affirmed, with costs to the respondent Levy, or his attorney.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

SILAS W. SMITH, APPELLANT, v. JAMES H. LYKE,  
RESPONDENT.13h 204  
69 AD 588

*Enticing wife from husband—right of action for—good faith of person receiving—  
when a defense.*

Upon the trial of an action brought by a husband against his wife's father to recover damages for enticing away his wife, evidence was given tending to show that the wife, by reason of illness, was unable to leave her husband's house without assistance, and that her father, at her request, removed her to his own. The justice charged that, even if the husband's treatment of his wife was not improper, in fact, yet if such complaints were made to the defendant, by the wife and others, as induced him to believe that she was cruelly treated by her husband, and he acted in good faith in taking her to his house, the plaintiff could not recover.

*Held*, that the charge was correct.

APPEAL from a judgment in favor of the defendant, entered on the verdict of a jury, rendered at the Steuben Circuit before Mr. Justice RUMSEY.

The action was brought to recover damages for enticing away the plaintiff's wife, who was the defendant's daughter.

*W. Rumsey*, for the appellant.

*Butler & Searl*, for the respondent.

SMITH, J.:

A husband may maintain an action for enticing away his wife, or inducing her to live apart from him, even against the wife's father. (*Winsmore v. Greenbank*, Willes R., 577; *Hutcheson v. Peck*, 5 Johns., 196.) In the present case, the judge, after instructing the jury in accordance with the rule above stated, charged them, in substance, that if the plaintiff treated his wife in a cruel and inhuman manner, so that his home was unfit for her to live in, and the defendant took her to his own house, at her request, he was justified in doing so. He further charged them, that even if the husband's treatment of his wife was not improper, in fact, yet if such complaints were made to the defendant, by the plaintiff's

wife and others, as induced him to believe that she was cruelly treated by her husband, and he acted in good faith, the plaintiff cannot recover. To the latter instruction an exception was taken, which raises the principal question in the case. It has been repeatedly held in actions for harboring the wife, that the material point of inquiry is the intent with which the defendant acted. (*Hutcherson v. Peck*, *supra*; *Schuneman v. Palmer*, 4 Barb., 227; *Bennett v. Smith*, 21 id., 439.) The counsel for the plaintiff suggests that in all the cases so holding, it appeared that the defendant's wrongful conduct consisted merely in harboring the wife, or advising her to leave her husband, not in actively invading the plaintiff's rights, by taking his wife from his house. But wherein do those cases differ in principle from the case at bar? In the present case, the evidence warrants the conclusion that the wife, by reason of illness, was unable to leave her husband's house without assistance, and that her father removed her to his own house, at her request. If he believed from her statements that she was cruelly treated by her husband, was he not as fully justified in removing her from her husband's house to his own, she not being able to get away without assistance, as he would have been in receiving and harboring her in his own house if she had gone there without his aid and sought shelter? It is argued that the defendant should have investigated the complaints, and that not having done so, he acted on them at his peril. It is true he might have gone to the husband with the complaints and inquired as to their truth, but we do not think his omission to do so necessarily rendered him liable. At most, it was but a circumstance to be considered by the jury in determining the intent with which he acted.

We think the case was properly disposed of at the Circuit, and that the judgment should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed.

JOHN N. BOUGHTON, EXECUTOR, ETC., OF DAVID FLINT,  
DECEASED, AND OTHERS, APPELLANTS, v. MARY FLINT, EXECU-  
TRIX, ETC., RESPONDENT.

*Surrogate—jurisdiction of, over disputed claims.*

A surrogate has no jurisdiction upon a final accounting to hear and determine the validity of a disputed claim against the estate of a deceased person.

Where, upon a final accounting, the executrix presents an account in which is contained an item for money paid by her to a creditor, in settlement of a claim against the estate, which item is objected to and attacked by her co-executor and by the other persons interested in the estate, the surrogate has no jurisdiction to determine as to the validity of the same, or to refer the same to an auditor. (Per SMITH, J.)

APPEAL from a decree of the surrogate of Erie county, on the final settlement of the accounts of Mary Flint, executrix, and John N. Boughton, executor, of the last will and testament of Daniel Flint, deceased.

*L. P. & E. B. Perkins* and *Thos. Cortell*, for the appellants.

*Jacob Stern* and *T. C. Beecher*, for the respondent.

SMITH, J. :

On the accounting before the surrogate, the respondent and executrix, Mary Flint, presented a claim against the estate of the testator, in her own behalf, to the amount of \$800, with interest from April 15, 1859, for moneys alleged to have been placed in the hands of the testator, on deposit for the said respondent, who was the testator's wife. She also claimed to be credited in her account as executrix, with the sum of \$1,756<sup>00</sup>/<sub>100</sub>, alleged to have been paid by her in full of a promissory note of the testator, held, at the time of his death, by Mary Brown, who, as appeared from the evidence, was the mother of Mrs. Flint. These claims were allowed by the surrogate, after having been contested by Mr. Boughton, the executor and the other parties, who now appeal. The claim for the alleged deposit was heard before the surrogate. The claim for the alleged payment to the creditor, Mrs. Brown, was referred by the surrogate



to an auditor, who reported in favor of the executrix, and his report was confirmed by the surrogate.

After some controversy in the courts on the subject, it seems now to be settled that a surrogate has not jurisdiction upon a final accounting to hear and determine the validity of a disputed claim against the estate of a deceased person. The Court of Appeals is understood to have so held in the case of *Tucker v. Tucker* (4 Abb. Ct. App. Dec., 428; S. C., 4 Keyes, 136; see, also, *The Matter of the Estate of John Shaw*, 1 Tucker, 352, and the cases there cited in the opinion of the surrogate of New York; *Shakespeare v. Markham*, 10 Hun, 311; *Magee v. Vedder*, 6 Barb., 352; *Wilson v. The Baptist Education Society*, 10 id., 308; *Disosway v. The Bank of Washington*, 24 id., 60; *Curtis v. Stilwell*, 32 id., 354.) The debts and claims against the estate, which the surrogate is authorized to settle and determine (2 R. S., 95, § 71), are those only which are undisputed. (Id.) The question whether the surrogate had jurisdiction of the claim presented by the executrix as such, for money paid for her, upon the demand of the creditor, Mrs. Brown, which was disputed by Boughton, the co-executor, is not so clear. Had the claim been disputed by both executors on being presented by the creditor, the surrogate would not have had jurisdiction to try it. Does the fact that the claim was admitted and paid by one of the executors, without the consent and knowledge of the other (he objecting to the claim and disputing it, when informed of it), confer jurisdiction upon the surrogate to investigate, settle and allow it, as a charge in favor of the executor so paying, on the final account; it being then contested by the co-executor, and by some of the parties entitled to distribution.

I am not aware of any case in which the precise question has been considered. The presentation of a claim against the estate to one of several executors, or administrators, is undoubtedly sufficient on the part of the creditor, without presenting it to the others. (*Knapp v. Curtiss*, 6 Hill, 388, per BRONSON, J.) And one of several executors or administrators may pay claims presented against the estate, without the knowledge and concurrence, and even against the will of his co-executor or co-administrator. The general rule is, that several co-administrators or co-executors are, in law,

but one person representing the testator, and acts done by one in reference to the delivery, sale, gift or release of the testator's goods, are deemed the acts of all. (*Murray v. Blatchford*, 1 Wend., 583; *Wheeler v. Wheeler*, 9 Cow., 34; *Stuyvesant v. Hall*, 2 Barb. Ch., 151; *Jackson v. Robinson*, 4 Wend., 436.) But one administrator or executor acting without the concurrence of his associates, so acts at his peril, and if he pays a claim that is not a valid obligation against the estate, or if he pays more than is due, or to become due, he does it at the risk of being adjudged guilty of a *devastavit*, and of being obliged to account for what he has improperly paid out. (*Murray v. Blatchford*, *supra*.) That there are cases in which the person entitled to the personal estate may be relieved against the acts of the executor, and a debtor or creditor, is shown by numerous authorities, some of which are cited by EMOTT, Circuit Judge, sitting for the Chancellor, in *Murray v. Blatchford* (*supra*). Among them is the case of *Alsager v. Johnson* (4 Ves., 217; *Alsager v. Rowley*, 6 id., 748), in which it appeared that an action at law was commenced against executors by an alleged creditor of the testator, the residuary legatees applied to the executors to be permitted to defend, which was refused, a verdict was had, and under it the prothonotary awarded a large sum as due. The legatees filed their bill against the plaintiff in the action, and the executors, impeaching the demand and charging collusion, the legatees were relieved, although there does not appear to have been proof of a fraudulent collusion. Lord ELDON, not passing upon the question of collusion, said, he was inclined to think a decree might be made against the creditor, on the ground that, whether there was a debt due, and to what extent, had never been tried with that searching attention which the legatees had a right to expect from the executors. Now, in the present case, the co-executor and some of the legatees objected to the allowance of the claim of the executrix before the surrogate, on the ground that a considerable part of the debt had been paid by the testator in his life-time. The issue thus made, the surrogate assumed jurisdiction to try, and he ordered it to an auditor, whose report he confirmed.

I cannot resist the conclusion that in so doing the surrogate exceeded his jurisdiction. If he had jurisdiction his decree bars the legatees from proceeding in any other court, and their right to

an action in equity against the executrix and creditor is cut off. I cannot think such a result was intended by the statute which makes the final settlement of the accounts of the executor or administrator conclusive evidence that the charges made in such account, for moneys paid to creditors, etc., are correct. (2 R. S., 94, § 65.) The statute relates, in my judgment, to charges for payment of undisputed debts, and no others. In this respect, sections 65 and 71 are to receive a like construction. The case of *Shakespeare v. Markham* (*supra*) seems to be an authority for this conclusion. There a question arose as to the jurisdiction of the surrogate to try a claim which was held originally by the executor and three others, who subsequently assigned their interest to the executor. The claim was disputed by some of the persons entitled to share in the distribution of the estate, and this court held that the surrogate had not jurisdiction to try the claim. The executrix must resort to her action for this claim, when the defendants may avail themselves of such defense as they may have. This question of jurisdiction does not appear to have been raised before the surrogate; it is, nevertheless, available on appeal, but as it is now presented for the first time, the appellants are not entitled to costs.

We also think the surrogate erred in excluding testimony as to the amount actually paid by the executrix upon the note held by Mrs. Brown. The executrix was only entitled to recover what she actually paid.

Decree reversed and proceeding remitted to the surrogate of Erie county, without costs of appeal to either party.

MULLIN, P. J., and TALCOTT, J., concurred.

Decree reversed and proceedings remitted to the surrogate of Erie, without costs of appeal to either party.

SARAH E. HOLLISTER, RESPONDENT, v. EDWARD L.  
HOPKINS, IMPLEADED, ETC., APPELLANT.

*Bill of exchange — what is.*

This action was brought upon the following instrument: "Rochester, July 17, 1875. Edward L. Hopkins. One month after date, pay to the order of Hollister & Co., seven hundred and eighty-two dollars and thirty-four cents, and charge the same to me, to apply on contract for your building on South avenue. (Signed) J. R. Flowerday." The plaintiff proved the acceptance and indorsement of the instrument and rested. Defendant offered to prove that there was nothing due to the drawer of the instrument upon his building contract, at the time it was drawn, and that there was no consideration for the acceptance between the drawer and acceptor, which evidence was, upon plaintiff's objection, excluded.

*Held*, that the instrument was a bill of exchange, and not a mere assignment of a fund, and that the evidence offered was properly rejected as immaterial and irrelevant.

APPEAL from a judgment entered upon the direction of the court at the Monroe Circuit, held by Mr. Justice DWIGHT.

This action was brought against the defendant as the acceptor of a draft, drawn in these words:

"ROCHESTER, *July 17, 1875.*

Edward L. Hopkins. One month after date pay to the order of Hollister & Co., seven hundred and eighty-two dollars and thirty-four cents, and charge the same to me, to apply on contract for your building on South avenue.

(Signed) J. R. FLOWERDAY."

The plaintiff proved the acceptance by E. L. Hopkins and the indorsement of the instrument, and rested. The defendant moved for a nonsuit on the ground that the instrument proved was not a bill of exchange, but was merely an assignment of a fund, and the plaintiff could not recover without showing the existence of such fund. The motion was denied, and the defendant excepted. The defendant then called the drawer and offered to prove that when the instrument was drawn he had ceased to work on the building mentioned in the instrument, and that the drawee owed him nothing. Also, that there was no consideration for the contract between the drawer and acceptor. The evidence was excluded. Judgment was thereupon ordered for the plaintiff.

*A. J. Wilkin*, for the appellant.

*J. B. Perkins*, for the respondent.

SMITH, J. :

The instrument in evidence was a bill of exchange, payable, at all events, and not on a contingency ; payable, also, in money only, and not out of a particular fund. The direction to charge the same to the drawer, to apply on contract for building, did not make the draft payable out of moneys due or to become due on the contract. It was simply a direction to the drawee how to reimburse himself. (*Macleod v. Snee*, 2 Strange, 762 ; *Munger v. Shannon*, 61 N. Y., 251, per DWIGHT, C., p. 256.)

The evidence offered was immaterial and was properly rejected. There was no offer to prove the entire answer, or to show that there was no consideration between the drawer and the payee.

The judgment should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed.

THE PEOPLE EX REL. THE NIAGARA BRIDGE AND  
CANANDAIGUA RAILROAD COMPANY, APPELLANT,  
*v.* THE LOCKPORT AND BUFFALO RAILROAD COM-  
PANY AND OTHERS, RESPONDENTS.

13h 211
52nd 200
13h 211
166a 177

*Application for change of railroad route — chap. 140 of 1850, and chap. 560 of 1871 — the notice — must be personally served.*

The notice required by the statute (§ 22 of chap. 140 of 1850, as amended by chap. 560 of 1871) to be given on an application for a change of the proposed route of a railroad company, must be personally served.

*Quare*, whether, in a case where personal service is impracticable, the court would have power, under the seventh subdivision of section 14, to direct service to be made in some other mode.

APPEAL from an order of the Erie Special Term held by Mr. Justice BARKER, and from the judgment entered thereon, dismissing

a writ of *certiorari* directed to Mr. Justice DANIELS to remove certain proceedings instituted before him, for the appointment of commissioners to change the proposed route of the Lockport and Buffalo Railway Company.

The proceedings for a change of route were commenced by the relator and appellant, under section 22 of the general railroad act (L. 1850, ch. 140, as amended in 1871, L. 1871, ch. 560), and were dismissed by Justice DANIELS on the ground that the service of notice on the contestants, Payne and Western Brothers, whose property would be affected by the proposed change of route, was not sufficient to give jurisdiction.

*A. P. Laning*, for the relator and appellant.

*E. C. Sprague*, for the respondents.

SMITH, J.:

The statute requires that the notice to be given of an application for a change of the proposed route of a railroad company, organized under its provisions, shall be a ten days' notice, in writing, and that it shall be given to the company and to the owners or occupants of lands to be affected by the proposed alteration. (L. 1850, ch. 140, § 22, amended by L. 1871, ch. 560.) The statute is silent as to the mode of service of such notice. The provisions of section 14 of the act of 1850, respecting the service of a petition by the company, with notice of the time and place when it will be presented to the court for the purpose of acquiring land covered by its proposed route, have no application. It follows that the service intended by the statute is a *personal* service, none other being specified or indicated. (*Rathbun v. Acker*, 18 Barb., 393; *McDermott v. Board of Police*, 25 id., 635, 646.) It is possible that in a case where personal service is impracticable, the court, on such fact being shown, would have power, under the seventh subdivision of section 14, to direct service to be made in some other mode, but, without deciding that point, it is enough to say that no such direction was made in this case.

It appeared affirmatively, before Justice DANIELS, that due personal service was not made on Payne, or on Western Brothers. In

Payne's case the notice was left with his wife, at his dwelling-house, he being absent from home, but within the State and in an adjoining county, and the notice did not come to his hands till within the ten days. "Western Brothers" are a firm, composed of Abijah Western, William W. Western and Orrin Western, each of whom resides in this State. Of the lands laid down on the map of the relator as owned by them, a part was owned by Abijah Western and Alanson I. Fox, who lives in this State; another part by the heirs of A. H. Ames, and the remainder by the firm of Western Brothers. The entire parcel was leased to James D. Western and Abijah Western. James D. Western lived in Tonawanda, and was in the actual occupancy of the premises. Abijah Western had an agent, Hector M. Stocum, who also occupied the premises as such agent. Stocum was the only person served with notice. As Stocum occupied as an agent, and not in his own right, it is at least doubtful whether the service on him affected even his principal; but however that may be, James D. Western, who occupied with him, was equally entitled to notice, and, as he had none, the service, for that reason, was clearly insufficient.

The service of notice on all the parties entitled to notice was a prerequisite to the appointment of commissioners. (*In re Long Island R. R. Co.*, 45 N. Y., 364; *In re Norton v. The Walkill Valley R. R. Co.*, 63 Barb., 77, 81.) The proceeding was, therefore, properly dismissed for want of jurisdiction.

Order and judgment affirmed, with one bill of costs and disbursements to the respondents.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

## RICHARD SMITH, PLAINTIFF, v. THE CITY OF ROCHESTER, DEFENDANT.

*Common council of Rochester — power of, over fire department — liability of city for negligence of a member of the fire department.*

A committee of the common council of the city of Rochester directed the fire department of the city to assemble in front of the city hall, at midnight, on the 31st of December, 1875, to celebrate the incoming of the centennial year. This action was brought to recover damages for injuries sustained by plaintiff who was struck by one of the hose carts through the negligence of the driver.

*Held*, that the common council had no authority to direct the fire department to so assemble, and the city was not responsible for injuries occasioned thereby. That even if the common council had authority to so direct, yet the city would not be liable for the negligence of a member of the fire department while engaged in the performance of his legitimate duty as such, whether in exercising, as directed by the common council, or in endeavoring to prevent or extinguish a fire.

MOTION by the plaintiff for a new trial, on exceptions taken at the Monroe Circuit, before Mr. Justice DWIGHT, and ordered to be heard at the General Term in the first instance.

This action was brought to recover for injuries caused by the negligence of the driver of a hose cart, who is alleged to have been acting at the time in the employment and under the direction of the defendant. The hose cart was driven along a public street of the city of Rochester, in the night time, in obedience to an order of a committee of the common council, directing the fire department of the city to assemble in front of the city hall, at midnight, on the 31st December, 1875, to celebrate the incoming of what is known as the "centennial year." It was alleged that, by the carelessness of the driver, the horses and hose cart were driven against the plaintiff, the night being very dark, and he was knocked down and injured. The plaintiff was nonsuited on the opening of his counsel.

*J. H. Martindale*, for the plaintiff. When the corporation directs the use of the property of the fire department in any service, not of a public nature enjoined by law, but for private emolument, caprice, display or pleasure, it is just as much responsible for dam-



ages arising from negligent misconduct as any other person, or as for any other malfeasance. In this case the corporation was celebrating a great event, by fireworks and sports, and using the horses and cart for that purpose, and not in public service, when the injury complained of was inflicted on the plaintiff. (*Oliver v. City of Worcester*, 102 Mass., 499-500, and cases there cited; *Thayer v. City of Boston*, 19 Pick., 511; *Dillon on Munic. Corp.*, §§ 778, 779, 780, 790 [2d ed.], and notes; *Brice's Ultra Vires* [Green's ed.], 265 and 269; 22 N. Y., 305, 306; 58 id., 639; 2 Den., 433; 62 N. Y., 170; *Neuert v. City of Boston*, 120 Mass., 338.) The corporation had the right and power to require the appearance of the horses, cart and driver at the time and place designated, and, in execution of such power, to vest a committee with power to employ such horses and cart, and direct them to be present at the place appointed. The corporation is liable for the trespasses of its officers, acting pursuant to its orders, where the subject matter of the order is not *ultra vires*. (*Dillon on Corp.*, §§ 769, 770, 780; *Lee v. Village of Sandy Hill*, 40 N. Y., 442; *Brice's Ultra Vires* [Green's ed.], 265, 269; *Angell & Ames on Corp.* [10th ed.], 326; 15 N. Y., 512, 519; 21 How. [U. S.], 209-210; 19 Pick., 511; 3 Lans., 44; 2 Hilt., 358; 5 Bosw., 414, 419, 420; *Bastable v. City of Syracuse*, 3 N. Y. Weekly Dig., 467, Gen. T., 4th Dept.; S. C., 8 Hun, 592, fully reported; 1 T. & C., 537; 1 Hun, 343; S. C., 3 T. & C., 504.)

*J. B. Perkins*, for the defendant. For the negligence of any person employed by the city, as a member of the fire department, the defendant is not liable. A person employed in this capacity is not deemed a servant of the corporation, for whose negligence it is liable. (*Jewett v. New Haven*, 38 Conn., 368; *O'Meara v. Mayor*, 1 Daly, 425; *Wheeler v. Cincinnati*, 19 Ohio, 19; *Hofford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass., 87; *Maximilian v. Mayor*, 62 N. Y., 160.) If it was a legitimate use of the fire department, the city is not liable under the cases cited under the first head. If it was an illegitimate use, then the whole thing was *ultra vires*, and there is no liability. (*Mayor v. Cunliff*, 2 Comst., 165; *Brown v. Utica*, 2 Barb., 104; *Anthony v. Inhabitants of Adams*, 1 Metc., 284; *Morrison v. Lawrence*, 98 Mass., 219; *Dillon on Munic. Cor.*, §§ 767, 768, and cases cited.)

SMITH, J.:

The plaintiff seeks to hold the defendant liable in this action, on the principle that the employe is responsible for the negligence of his servant. The defendant is a municipal corporation. Its powers are largely vested in a body of public officers, known as the common council, under whose direction the person was acting, whose negligence (as is now to be assumed) caused the inquiry of which the plaintiff complains.

The rule which makes natural persons liable for the wrongful or negligent acts of their servants and agents, done in the course and within the scope of their employment, applies to corporations as well, whether municipal or created for purposes of pecuniary gain. (*Lee v. The Village of Sandy Hill*, 40 N. Y., 442, and cases there cited by MASON, J., p. 447.)

In this case, the driver of the hose cart was undoubtedly acting within the scope of his employment, provided the common council had authority to order the fire department to turn out on the occasion, and for the purpose above stated. To justify the conclusion that the common council had authority to make the order in question, it must appear that they were authorized by the charter of the city to do the act, or that they did it *bona fide*, in pursuance of a general authority to act for the city on the subject to which it relates. This is, in substance, the rule that was followed by the Supreme Court of Massachusetts, in the case of *Thayer v. The City of Boston* (19 Pick. R., 516), and by the Court of Appeals in this State, in *Lee v. The Village of Sandy Hill* (*supra*), and in view of what was said by the judges in those cases, the rule must be regarded by us as defining the extent to which the principle, which holds the principal liable for the act of his agent, is to be applied against a municipal corporation. As such a corporation is created for governmental purposes only, it possesses merely such powers as are expressly granted by law, or such as are necessary to carry into effect the powers expressly conferred. No act of its officers, *ultra vires*, will make the corporation, or the inhabitants of the municipality composing it, liable upon contract or in tort. The cases cited by the appellant's counsel, in which municipal corporations have been held liable for the acts of their agents, were within the rule laid down in *Thayer v. The City of*

*Boston (supra)*. They are *The Mayor v. Bailey* (2 Den., 433), *Turnpike Company v. City of Buffalo* (58 N.Y., 639), *Maximilian v. The Mayor* (62 id., 170), *Oliver v. City of Worcester* (102 Mass., 499 and cases there cited), *Neuert v. City of Boston* (120 id., 338). A different rule is applicable to corporations created to carry on business for pecuniary profits. (See *Bissell v. Mich. S. and Northern Ind. R. R. Co.*, 22 N. Y., 258, *per SELDEN, J.*, p. 305, *et seq.*)

The question of the authority of the common council to order out the fire department of the city, at the time and place, and for the purpose specified, involves, then, two inquiries, the first of which is whether they were authorized by the charter to make the order. The provisions of the charter (Laws of 1861, ch. 143), in which the appellant's counsel suggests the authority is to be found, will be briefly referred to. Section 222 provides that the common council may organize and maintain a fire department for said city, to consist of one chief engineer, four assistants, and so many fire wardens and firemen as may be appointed by the common council. And by section 223, it is enacted that the common council may make rules and regulations for the government of said engineers, wardens and firemen; may prescribe their respective duties in case of fire or alarms of fire; and may prescribe and regulate the time and manner of their exercise, and may impose reasonable fines for the breach of any such regulations. Those provisions are contained in title 8, headed: "Prevention and extinguishment of fires." Section 40, vests in the common council the management and control of the prudential affairs of the city, and of its property, and the power to make such orders and by-laws relating to the same as it shall deem proper and necessary. These provisions are far short of giving authority to make the order in question. Their sole object, in vesting the common council with power over the fire department, is to prevent and extinguish fires. But the order directing the fire department to turn out, at midnight, to attend the "centennial" celebration, had no connection with that object. However laudable the impulse by which the order was prompted, it was an excess of authority; like the action of the common council of Buffalo, in *Hodge's case (supra)*, in furnishing an entertainment for the citizens and guests of the city, on the fourth of July, at the public expense.

The order in question can not be regarded as a use of the power

of the common council to regulate the exercise of the fire department. But if the order could be so regarded, it is enough to say that for the negligence of a member of the fire department while engaged in the performance of his legitimate duty as such, whether in exercising as directed by the common council, or in endeavoring to prevent or extinguish a fire, the city would not be liable.

The charter, in providing for the preservation of the city from damage and exposure to danger from fire, must be regarded as imposing a public duty for the public welfare, and the fire department when engaged in extinguishing fires, or in exercising pursuant to the orders of the city authorities, were performing a public, governmental act, for the general good, and an action will not lie against the city for their negligence while acting in the discharge of their official duty. (*Jewett v. New Haven*, 38 Conn., 368; *O'Meara v. Mayor*, 1 Daly, 425; *Wheeler v. Cincinnati*, 19 Ohio, 19; *Hafford v. New Bedford*, 16 Gray, 297; *Fisher v. Boston*, 104 Mass., 87.)

The appellant's counsel also suggests that the power in question is included in the authority to regulate "sports" (§ 40, sub. 4), and the exhibition of fireworks (sub. 6). The authority given for that purpose is one of police, by which showmen and exhibitors may be regulated and controlled, in the interests of the city. It was not intended that the common council should have authority to embark the city in enterprises of that character.

The second inquiry is whether the common council made the order *bona fide*, in pursuance of a general authority to act for the city on the subject to which the order relates. The principle involved in this inquiry applies only to those cases in which the rights of both the public and of individuals are involved, in which it can not be known at the time the act is done whether it is lawful or not. In *Thayer v. City of Boston*, the officers of the city, having authority over streets and public lands, took possession of land which the plaintiff claimed was a public highway. The Court held that the city was liable, as its officers, although they in fact exceeded their authority, yet acted in good faith, in pursuance of their general authority over the subject matter, and for the benefit of the city. The case of *Lee v. The Village of Sandy Hill* (*supra*) was of a similar character. But those cases have no analogy to this. In each

of them, the authority of the agents of the corporation to do the particular act depends upon certain apparent facts, which were ultimately adjudged not to exist. Here there was no doubtful question of fact, but the act of the common council was *ultra vires*, as matter of law, upon the facts as they were known to be at the time. It follows that the city is not liable, and that the plaintiff was properly nonsuited.

The motion for a new trial should be denied, and judgment ordered for the defendant on the merits.

MULLIN, P. J., and TALLOTT, J., concurred.

Ordered accordingly.

ELLA S. MORROW, BY GUARDIAN, ETC., RESPONDENT, v. JOHN J. OSTRANDER, TRUSTEE, ETC., APPELLANT.

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164a 22

*Memoranda — when admissible in evidence.*

Upon the trial of this action, brought by the plaintiff to recover for the breach of a contract made with her by the defendant's predecessor, the principal issue of fact was as to the genuineness of the signature of the school commissioner, Strough, to a certificate that she was qualified to teach. Upon the trial Strough was called as a witness, and testified that to the best of his knowledge and belief he did not sign or issue the certificate. He also testified that he kept a book, in which he entered the certificates issued by him during the month in which the certificate in question bore date. The counsel for defendant produced this book and offered it in evidence to show that it contained no entry of the certificate in question. Upon plaintiff's objection, the book was excluded. *Held*, that its exclusion was error.

The counsel for defendant asked Mr. Strough whether, during his term of office, he was accustomed to issue such certificates except upon a personal examination of the applicant, which question was, upon the objection of plaintiff's counsel, excluded. *Held*, that this was error.

**APPEAL** from a judgment of the Jefferson County Court, entered on a verdict in favor of the plaintiff, and from an order of the said court, denying a motion for a new trial made on the minutes, and on a case and exceptions, and also from an order of the county judge declining to pass upon the question of the trustee's good faith

This action was brought to recover for an alleged breach of contract in refusing to permit plaintiff to teach the school in defendant's district during the school year of 1875-76.

*D. O'Brien (Lansing & Rogers)*, for the appellant.

*W. F. Porter*, for the respondent.

SMITH, J. :

That the defendant's predecessor in office had authority, on the last day of his term, to employ a teacher for the ensuing year, provided he acted in good faith, with due regard to the interests of the district, cannot be questioned ; and whatever his motive may have been, if the plaintiff entered into the contract with him in good faith, and was ready and willing to perform on her part, the district is liable for the refusal of the defendant to permit her to teach the district school for the time agreed on. If, however, both parties to the contract acted collusively, with intent to defraud the district, or to embarrass the defendant in the discharge of his duties and the exercise of his authority as the trustee of the district, the contract was void for that reason. And the fact that the contract was made on the last day of the term of the outgoing trustee, was a circumstance for the jury to consider in determining whether the parties to the contract acted collusively. If the contract was valid, and was broken by the defendant, the plaintiff, if ready, willing, and offering to perform, was entitled to recover the wages stipulated by the contract, unless it appears that, by a reasonable effort on her part, she might have procured like employment elsewhere.

In accordance with these principles the cause was tried, and we would have no difficulty in affirming the judgment but for one or two rulings of the judge, on questions of evidence, which we are constrained to hold were erroneous and prejudicial to the defendant.

1. By the terms of the contract the plaintiff was to obtain a certificate from the school commissioner, Mr. Strough, that she was qualified to teach before commencing her school in the defendant's district. At the trial she produced and put in evidence a paper purporting to be what is called a "first grade" certificate, signed by Mr. Strough. The genuineness of the signature of the certifi-

cate was contested, and formed the principal issue of fact in the case. Upon that issue Mr. Strough was examined as a witness on the part of the defendant, and testified that, to the best of his knowledge and belief, he did not sign or issue the certificate in question. He also testified that he kept a record of the certificates issued by him. He produced a book which contained a record or memorandum kept by him of the certificates issued by him during the month of November, 1875, in which month the certificate in question bore date, and was alleged by the plaintiff to have been issued; and on his being asked to turn to the memorandum for that month, the plaintiff's counsel objected that it was an attempt to corroborate the statement of the witness by his own memorandum. The court then asked the witness if the book was one that he was required to keep by law, and on his answering that it was not, the court decided that the memorandum was not competent, and the defendant's counsel excepted. The defendant's counsel then offered to show that during the fall of 1875 the witness kept a book, in which he made entry of all certificates issued by him, specifying the grade of the certificate, and the person to whom issued, and that it contained no entry or mention of the certificate produced in evidence. The court excluded the offer, and the defendant's counsel excepted. The County Court seems to have excluded the memoranda on the ground that they were not required to be kept by law. Whether or not the memoranda were admissible, the reason assigned for excluding them was not sound. There is no distinction, in this respect, between entries which are required to be made officially or in the course of business, and those which are made voluntarily outside of the routine of the business of the party making them. Formerly, in this State, the rule admitting entries was restricted to those made by a person in the course of his business duties. (*Bank of Monroe v. Culver*, 2 Hill, 531; *Merrill v. The Ithaca and Owego R. R. Co.*, 16 Wend., 599.) But that restriction no longer exists. In *Halsey v. Sinsebaugh* (15 N. Y., 485) it was held that, in general, a memorandum made at or about the time when the event or transaction mentioned in it took place, and where the author swears that he knows it to have been correct when made, may be read to the jury in connection with the oral testimony of the witness. The memorandum in that case was the

minutes of testimony taken by the counsel upon a former trial of the cause, the matter to be proved being what a witness had sworn to on that trial, and it was held to be admissible. The rule there laid down was approved, and followed in *Guy v. Mead* (22 N. Y., 465). In that case it was held, that upon the question at what time the latter of two indorsements upon a promissory note was made, a paper is admissible evidence, which contains a computation of interest upon the note by a witness who swears that, when he made it, the note bore but one indorsement, but who has no recollection of the date of the computation independent of the paper.

The two cases referred to show that the entries of the school commissioner, in the case at bar, were not inadmissible for the reason that it was not his duty to make them. The present case differs from those cited in two particulars, but we think they do not take it out of the rule. They will be briefly adverted to.

In the two cases cited, the witness had no recollection of the fact sought to be proved, independently of the memorandum, while in this case the witness Strough had some recollection of what occurred at the time when the certificate in question was alleged to have been given, but he was not able to speak positively on the point, and went no further than to deny the giving of the certificate, according to the best of his knowledge and belief. His recollection being indistinct, but so far as it went, being in accordance with the memorandum, why was not the latter admissible as independent corroborating testimony? To exclude it, if it was honestly and correctly made, would be to reject a very satisfactory mode of arriving at the truth. At an early day the rule was that such a memorandum as is above described might be used to refresh the recollection of the witness, but could have no force as evidence, unless the witness, after referring to the memorandum, had a recollection of the facts to which the memorandum related. But that rule was abrogated by later decisions, which held that in such case a memorandum might be read as evidence of the fact contained in it, *although* the witness may have totally forgotten such facts at the time of the trial, not that the total want of recollection of the witness is a requisite to the admissibility of a memorandum made by him, but that it is no objection to its admissibility; much less does a partial failure of the recollection of the witness constitute a



reason for excluding his memorandum. Another respect in which the present case differs from those above cited, is that in this case the evidence furnished by the memorandum of the witness is of a negative character, while in the cases cited the memorandum contained positive affirmations as to the fact in dispute. But if the entries were accurately and promptly made, the absence of an entry on a particular day is some evidence that no certificate was granted on that day, and to that evidence, though slight perhaps, we think the defendant was entitled.

2. It appeared in evidence that the plaintiff was not examined by the commissioner, Mr. Strough, in respect to her qualifications as a teacher. Mr. Strough was asked whether, during his term of office, it was his custom to issue certificates of the first grade without a personal examination of the candidate. He was also asked whether he in fact signed or delivered any certificates of the first grade during his term, without a personal examination of the candidate. A general objection to each question was sustained, and the defendant's counsel excepted. It is to be assumed, for the present purpose, that an answer to those questions would have shown that the usual custom of the witness was not to issue a certificate till he had examined the applicant. The presumption would then have arisen that in this instance there was no departure from the usual course, and consequently that as there was no examination, no certificate was issued. (Greenl. Ev., § 40, note 6, and cases there cited.) We think the exclusion of each of the items of testimony above considered was erroneous. That the rulings were prejudicial to the defendant, cannot be doubted. The testimony offered in each instance bore directly upon the genuineness of the certificate, and its exclusion may have turned the scale in the plaintiff's favor.

The judgment and the order denying a new trial should be reversed and a new trial ordered, costs to abide the event. As the plaintiff has no present right to costs, the appeal from the order refusing to pass on the good faith of the defendant need not be considered, and a reversal of that order also follows as matter of course.

MULLIN P. J., and TALCOTT, J., concurred.

Ordered accordingly.

JOHN F. KILMER, RESPONDENT, v. JEREMIAH O'BRIEN  
AND ANOTHER, IMPLEADED, ETC., APPELLANTS.

*Appeal from a judgment entered on the report of a referee in the County Court —  
it is not necessary to move for new trial in the County Court.*

Under the provisions of the Code of Civil Procedure an appeal will lie to General Term from a judgment entered upon the report of a referee, the action pending in a County Court, upon a case and exceptions settled by referee; and a prior motion for a new trial in the County Court, exceptions and the decision of the referee is no longer requisite or pre-

MOTION to dismiss an appeal from a judgment of the Orleans County Court, entered on the report of a referee before whom the cause was tried in the County Court. The action was brought in the County Court to foreclose two mortgages. The ground of the present motion was that no motion for a new trial has been made in the County Court.

*G. F. Danforth*, for the motion.

*J. Van Voorhis*, opposed.

SMITH, J.:

In the case of *Hacker v. Ferrill* (66 Barb., 559), decided in this department in April, 1873, it was held that an appeal will not lie from a judgment entered on the report of a referee, in an action pending in a County Court, upon a case and exceptions settled by such referee, when it does not appear that a motion for a new trial was made in the County Court upon the exceptions, or that the decision of the referee on the trial, or in his report, had been reviewed in the County Court. That decision was followed in *Dahash v. Flanders* (2 N. Y. S. C. [T. & C.], 445), and in *Murray v. Vanderveer* (13 N. Y. S. C. [6 Hun], 302).

When those cases were decided, it was supposed that the Code of Procedure, which abolished writs of error and appeals in civil actions as they had existed previously to its adoption, and which restricted the review of a judgment or order to the mode prescribed by the

Code (§ 271), had also swept away the exceptions which, by the provisions of the Revised Statutes, were to be returned with the record from the common pleas (2 R. S., 423, § 78), and upon which the Supreme Court was authorized to give judgment and grant a new trial. (Id. § 80.) That such was the effect of the Code, was inferred merely from certain of its provisions. One was the provision which gave the County Courts authority to grant new trials, or affirm or reverse judgments in actions tried in those courts upon exceptions or case made subject to an appeal to the Supreme Court. (§ 30, sub. 13.) Another was the provision which gave, in an action brought by appeal from a Justice's Court, and retried in the County Court, the same power to the latter court over its own determinations and the verdict of the jury, as is possessed by the Supreme Court in actions pending therein. (§ 366, sub. 5, as amended in 1862.) Still another was the provision giving to the County Court, in the class of actions above mentioned, authority to entertain a motion for a new trial on a case and exceptions, or otherwise, before or after judgment. (Id., sub. 6.) Those provisions were regarded as implying that the County Court had exclusive original jurisdiction to entertain a motion for a new trial on exceptions, as well as to review the verdict of a jury, in an action tried in that court, and that the jurisdiction of the Supreme Court therein was purely appellate. (*Carter v. Werner*, 27 How. Pr. R., 385; *Simmons v. Sherman*, 30 id., 4; *Boughton v. Mitchell*, 29 id., 68, reporter's note; *Dahash v. Flanders*, *supra*.)

The provisions above referred to seem to have been changed materially by the Code of Civil Procedure. It is true that the jurisdiction of the County Court, in granting new trials, is quite as broad as formerly, that court having the same power and authority, in all respects, in an action or proceeding of which it has jurisdiction, which the Supreme Court possesses in a like case. (§ 348.) But several important changes in the practice relating to exceptions and motions for a new trial have been introduced by the new Code, which are applicable to County Courts and the Supreme Court alike. They are contained in the first title of chapter 10, entitled: "Trials generally; including exceptions and motions for a new trial." The provisions of that title are applicable to proceedings taken on or after the 1st day of September, 1877, in the Supreme Court, a

Superior City Court, the Marine Court of the City of New York, or a County Court. (L. 1876, chap. 449, known as the "temporary act;" § 5, subds. 7, 4, as amended by chap. 318 of Laws of 1877, called the "suspending act;" § 5, subd. 1.) Section 996 of the new Code provides that a ruling to which an exception is taken, as prescribed in the four sections immediately preceding it, can be reviewed only upon an appeal from the judgment, except in a case where it is expressly prescribed by law that a motion for a new trial may be made thereon. The rulings referred to are those of a court or referee, upon a question of law, arising upon the trial of an issue of fact (§ 992), including a refusal to find as requested upon a question of fact, or a finding without evidence to sustain it, upon the trial of an issue of fact by a referee, or by the court without a jury (§ 993), and generally any other ruling upon a question of law which is excepted to, including a charge to the jury. (§ 995.) And it is expressly prescribed that a trial by a referee can not be reviewed by a motion for a new trial, founded upon an allegation of error in a finding of fact, or ruling upon the law, except in a case where the report rendered upon the trial of an issue of fact directs an interlocutory judgment to be entered, and further proceedings must be taken before a final judgment can be entered. (§ 1002.) In such excepted case it is provided by section 1001 that a motion for a new trial, upon exceptions, may be made at the General Term, after the entry of the interlocutory judgment, and before the commencement of the hearing directed therein. The "General Term" intended by section 1001, when the action is in the County Court, is any term of that court, held pursuant to an appointment made as prescribed by law. ("Temporary act" *supra*, § 6, subd. 3.)

The present action, however, is not one provided for by section 1001. It falls within section 1002, and cannot be reviewed by a motion for a new trial in the County Court. If, then, the provisions of the new Code apply to the present motion, the decisions made under the former Code have no bearing on the question.

The appeal in this case was brought under the old Code, but at the time when the present motion was noticed the new Code had taken effect. At that time, consequently, a motion for a new trial in this action could not have been made in the County Court, and the only mode of reviewing the decision of the referee was by

appeal to this court. It would be an anomalous proceeding to grant a motion to dismiss an appeal for a lack of compliance with a rule of practice which had been abrogated by statute before the motion was noticed, and when the effect of granting the motion would be to leave the appellant remediless.

In view of the change wrought by the new Code as above pointed out, we think the proper course is to deny this motion without costs, to vacate the order heretofore made by us declining to hear the appeal, and to permit the parties to withdraw the papers submitted at the April term, and again submit or argue the cause on the appeal.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
NATHANIEL GREEN AND ANOTHER, RESPONDENTS, v. WIL-  
LIAM H. SMITH, COUNTY JUDGE, AND ANOTHER, APPELLANTS.

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42ap251

*Special proceeding—review of, on certiorari—costs upon—Chap. 270 of 1854, § 3.*

On an appeal to the Court of Appeals, in a proceeding brought into the Supreme Court by a common law *certiorari*, directed to an officer or tribunal other than a court, the successful party is not entitled to costs as a matter of course; whether or not costs shall be awarded rests in the discretion of the court.

APPEAL from an order of the Special Term in Monroe county, held by Mr. Justice DWIGHT, striking out of the judgment in this cause the costs taxed in favor of the appellants.

This was a common-law *certiorari* directed to the county judge of Ontario county, issued for the purpose of reviewing his adjudication in a proceeding to bond a town. On the return the General Term gave judgment for the relators, which was reversed in the Court of Appeals. The appellants procured costs of the appeal to the latter court to be inserted in the judgment entered on the *remittitur*, which contained no direction as to costs. On motion of the relators, the Special Term struck out the costs, and from that order this appeal is brought.

*H. L. Comstock*, for the appellants.

*E. B. Pottle*, for the respondents.

SMITH, J.:

The question in this case is, whether, on an appeal to the Court of Appeals, in a proceeding brought into this court by a common-law *certiorari* directed to an officer or tribunal other than a court, the successful party is entitled, of course, to the costs of the appeal. The question has been before the courts frequently, since the adoption of the Code, but the decisions are not altogether harmonious. Most of the cases agree in holding that a common-law *certiorari* is a "special proceeding," as defined by the Code and distinguished from a "civil action" (§§ 1 to 3); and to that position the counsel on both sides in this case assent. It is also agreed by counsel that section 318 of the Code of Procedure does not apply to the case, as that section relates exclusively to cases in which the decision of a court of inferior jurisdiction in a special proceeding is brought into this court for review; and in the present proceeding, the county judge did not act as a *court*.

The only provisions of the Code which give an absolute right to the costs of an appeal to the Court of Appeals are contained in title 10, which is headed "Of the costs of civil actions." That title forms a portion of the second part of the Code, which, by section 8, relates to civil actions commenced under the Code, except when otherwise provided therein, and which is entitled "Of civil actions." Notwithstanding this apparent limitation of the right to costs of an appeal to actions, as distinguished from special proceedings, it was held at an early day, by the Superior Court of the City of New York, in *The People ex rel. v. Sturtevant* (3 Duer, 616), with the sanction of two, at least, of the justices of that court (*id.*, p. 613, note *a*), that those provisions of the Code which relate to costs upon appeals are applicable to appeals in special proceedings, as well as to those taken in civil actions, strictly so called. As the counsel for the appellants herein is understood to rest his claim to costs in this proceeding upon the views which the court expressed in that case, it may be well to state them with more particularity. The case was this: The Court of Appeals, in affirming the final judgment or order of the Superior Court, in a proceeding against the defendant therein as for a contempt, had awarded to the relators the costs of the appeal, and the *remittitur* having been sent down, the question

before the Superior Court was whether the costs which the defendant was required to pay were those prescribed by the Code, or those which were taxable under the Revised Statutes. The court held that the costs to be inserted in the judgment were those given by the Code (§ 307, sub. 6), on appeal to the Court of Appeals. The argument on which the decision rested was that the title of the second part of the Code, "Of civil actions," is narrower than its contents, and is defective; that the provision of section 8, in the preliminary title, declaring that part second relates not only to civil actions commenced under the Code, but also (with the exception of the first four titles) to appeals to the Court of Appeals and other courts, was plainly unnecessary (assuming that appeals are properly comprehended under the general head of civil actions), unless appeals in other cases than in actions under the Code were meant to be embraced; that title 11 of the second part of the Code, which is headed "Of appeals in civil actions," relates to appeals in special proceedings as well; that evidence of this is found in section 333, in the second chapter of that title, which provides that "an appeal may be taken to the Court of Appeals in the cases mentioned in section 11," among which are appeals from a final order in a special proceeding; that the object of section 333 is to indicate the cases by a reference, without enumeration, to which the provisions of the chapter, and all general provisions throughout the Code in relation to appeals to the Court of Appeals, shall be construed to apply, and that the construction and effect of every section containing such a provision are consequently the same as if in each an appeal from a final order were separately mentioned; that the appeals to the Court of Appeals, which are referred to in the title "Of costs," are the same that the chapter "Of appeals" has declared may be taken, and consequently, that to every appeal so taken the provisions that govern the allowance of costs must be construed to apply. Other provisions of the Code were referred to, a proper construction of which it was held led to the same result. If the argument advanced in that case is sound, and it must be said that it is a very cogent one, it would seem to follow that the appellants herein have an absolute right to the costs in question, unless the right has been taken away by legislation subsequent to the adoption of the Code.

The third section of the act of 1854 (chap. 270) provides that in special proceedings and on appeals therefrom, costs may be allowed in the discretion of the court. It is not known that the act of 1854 had been passed when the decision in *The People v. Sturtevant* was made, as the date of the decision is not given by the reporter, but the statute is not mentioned in the case; and, undoubtedly, if then in existence, it was not brought to the attention of the court. The third section of the act, so far as it applies to special proceedings which were within the provisions of the Code respecting costs, as construed by the Superior Court, necessarily repealed or modified those provisions; for there can be no absolute right to costs which can only be allowed in the discretion of the court. The question then arises, whether the third section of the act of 1854 applies to all special proceedings and appeals therefrom, or whether it is limited by the first section, as the counsel for the appellants contends, to appeals from a Special to a General Term of either of the courts mentioned therein, in proceedings originating in the Special Term. If the latter construction is the correct one, the third section has no application to the present case. The question thus presented has been the subject of conflicting decisions. Without referring to all of them, it is enough to say that *The People v. Heath* (20 How. Pr., 304) is a leading case in support of the limited construction for which the appellant's counsel contends. It was decided by a divided court, but was cited with approbation by Mr. Justice WOODRUFF in the Court of Appeals, in *The People v. The Board of Police* (39 N. Y., 506). In the latter case it was held that costs are not awardable on a common-law *certiorari*; and a judgment of the Supreme Court allowing costs in such case, was reversed. The act of 1854 was not referred to in the case, although it was cited by the judge who wrote the opinion in the Supreme Court (*People ex rel. Cook v. Board of Police*, 26 How., 450), and was commented on in Heath's case. The remarks of Mr. Justice WOODRUFF in the subsequent case of *The People v. O'Brien* (6 Abb. [N. S.], 63), in which the point was ruled the same way, seem to indicate that the attention of the learned judge was not called to the statute. Those cases and many others were reviewed by Mr. Justice JOHNSON in the case of *The People v. Fuller* (40 How., 35), decided by the



General Term in this department in September, 1870. He was of the opinion that the decisions of the Court of Appeals in the cases above cited, were in conflict with the earlier adjudications of that court in *The People v. Wheeler* (21 N. Y., 86), and *The People v. Van Alstyne* (3 Keyes, 35), and he came to the conclusion that the provisions of the third section of the act of 1854 above referred to, were in no respect limited by the preceding sections of the act, and were manifestly so regarded by the Court of Appeals in the case last cited. He also held that a common-law *certiorari* is a special proceeding within the letter and spirit of the Code, and that this court has the power to award costs in such cases in its discretion. The other members of the court, MULLIN, P. J., and TALCOTT, J., concurred with him in deciding the case in accordance with the views expressed in his opinion.

We have not been referred to any subsequent case in the Court of Appeals which, in any way, impairs the authority of that decision, and we are not only bound to follow it according to the rule of *stare decisis*, but we think the decision is correct. It is to be observed that the legislature at their last session, repealed the first two sections of the act of 1854, and incorporated their provisions in the Code of Civil Procedure (§§ 1356, 1358 and 1359), leaving the third section in force, standing alone. (Laws of 1877, chap. 417, § 1, subd. 28, last clause.)

As the section now stands there can be no doubt that it is of unlimited application to all special proceedings and appeals therefrom, and the late action of the legislature is an indication that in their opinion it previously had the same scope and effect, and was not dependent for its construction, upon the preceding sections.

On the whole we think we must follow the case of *The People v. Fuller*, and we therefore hold that as costs were not given by the Court of Appeals to the appellants, they are not entitled to them and the order of the Special Term should be affirmed. But, as the question relates wholly to costs and is not well settled, no costs are given on this appeal.

MULLIN, P. J., and TALCOTT, J., concurred.

Order of Special Term, striking out costs, affirmed without costs.

FIRST NATIONAL BANK OF ROME, RESPONDENT, v.  
 GEORGE F. WILSON, IMPEADED, ETC., APPELLANT.

*Supplementary proceedings—Code, § 292.*

In order to authorize the making of an order before execution returned requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply his property to the satisfaction of the judgment, and has been refused by him.

APPEAL from an order of the Special Term in Oneida county denying a motion to set aside an order in supplementary proceedings, granted by the county judge of Oneida county.

The order of the county judge was made under the second subdivision of section 292 of the Code. It recited that proof had been made to the judge, by affidavit, of the recovery of judgment, and issuing of an execution, not returned, and also recited that it appeared satisfactorily to the judge that the debtor (the appellant) "has property and rights in action consisting of mortgages and other choses in action, which are not subject to levy and sale on execution, which he unjustly refuses to apply toward the satisfaction of said judgment, as stated and set forth in said affidavit." The order required the debtor to appear before the judge and answer concerning his property, and forbade him to transfer his property, etc.

*K. Carroll*, for the appellant.

*John S. Baker*, for the respondent.

SMITH, J. :

The principal point made by the appellant's counsel is, that the affidavit presented to the county judge was not sufficient to give him jurisdiction, inasmuch as it did not state that a demand had been made of the debtor to apply this property to the satisfaction of the judgment. The language of the affidavit, on that subject, is a transcript of the statute. It states a conclusion merely, and not

facts. We are of the opinion that in proceedings under this statute, the proof made on the application for the order, should show facts and circumstances, in order that the judge may decide whether there has been an unjust refusal, although, doubtless, the practice has been otherwise, to a large extent. The defect, however, is not jurisdictional. The averment, in the language of the statute, is enough to give jurisdiction. The defect is an irregularity which may be waived or amended. In this case it was amended by the affidavits read on the part of the respondent in opposition to the motion. Those affidavits allege a demand and refusal. That, we think, is enough, in view of the liberal construction required to be given to the provisions of the Code. (§ 467.)

The point is made that a copy of the affidavit was not served with the order. The Code does not require a copy to be served. An affidavit need not be made. The proof may be by affidavit, or otherwise. (Code, § 292.)

The order should be affirmed, with ten dollars costs and disbursements.

MULLIN, P. J., and TALCOTT, J., concurred.

Order affirmed, with costs, etc.

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ALPHA BARNES AND OCTAVIUS O. COTTLE, EXECUTORS,  
ETC., OF HIRAM FISH, DECEASED, APPELLANTS, v. AMANDA  
BARNES AND ROXA L. ARNOLD, RESPONDENTS.

*Application for a portion of a legacy for the support of the legatees — 2 R. S., 98, §§  
82, 83 — what must be shown to authorize the order — Bond — form of.*

The respondent, a legatee for life in the rents etc., of certain property devised by the will of appellant's testator, applied to the surrogate to be allowed to receive such part of the legacy as was necessary for her support, under the statute authorizing the surrogate to allow this to be done, upon it appearing to him that the assets in the hands of the executor exceed, by one-third, all debts, etc., then known, upon the execution of a satisfactory bond for the return of such portion, with interest, whenever required. A bond was tendered by the petitioners conditioned for the refunding of such moneys "as may be necessary to enable the executors to pay and discharge the debts of the testator, and the legacy having priority to hers."

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Upon appeal from an order made by the surrogate directing the payment to the petitioner of a portion of her legacy, *held*, that, in order to give jurisdiction to the surrogate, it must appear that there is a surplus of assets by at least one-third; and that as, in this case, no proof on this point appeared to have been taken before the surrogate, the order was unauthorized.

That the bond did not conform to the statute, which required it to be conditioned for the refunding of the money *whenever required*, and not simply, if necessary for the payment of debts and prior legacies.

APPEAL from an order of the Surrogate of Chautauqua county, directing executors, the appellants herein, to advance a portion of a legacy.

*Morris & Russell*, attorneys for the appellants.

*H. C. Kingsbury*, attorney for the respondents.

SMITH, J. :

The respondent, Amanda Barnes, a legatee for life, in the rents, issues and profits of certain property demised by the will of Hiram Fish, deceased, to his executors, in trust, applied to the surrogate, previous to the expiration of one year from the granting of letters testamentary, to be allowed to receive such portion of her legacy as was necessary for her support. The statute under which the application was made, provides that if it appear to the surrogate, that there is at least one-third more of assets in the hands of the executors, than will be sufficient to pay all the debts, legacies and claims against the estate, then known, he may, in his discretion, allow such portion of the legacy to be advanced, as may be necessary for the support of the person entitled thereto, upon a satisfactory bond being executed for the return of such portion, with interest, whenever required. (2 R. S., 98, §§ 82, 83.)

In the present case, the surrogate made an order on the 18th July, 1877, directing the executors to pay over to the said Amanda Barnes, from the income of the estate of the testator, certain sums, at certain dates therein specified, "on the tender to said executors or to any one of them, of a suitable bond approved by the surrogate, for the protection of said executors, or within three days thereafter." The case states that on the hearing before the surrogate a bond was presented, executed by the said Amanda and her sureties, in the penal sum of \$1,000, conditioned that the said Amanda should refund to the executors all such moneys "as are paid to her to apply upon

her legacy, on demand, with interest, or such ratable part thereof as may be necessary to enable the executors to pay and discharge the debts of the testator, and legacies having priority to hers." The bond was approved by the surrogate.

It seems to be essential to the jurisdiction of the surrogate in a proceeding under the statute referred to, that it should appear to him that there is a one-third surplus of assets. It does not appear by the terms of the order, or otherwise, that any proof was presented to the surrogate or that he made any determination on that subject. The order recites the presenting of the petition, and the petition set forth, among other things, that the estate amounts to over \$16,000; that the debts are of a very small amount, and that after the payment of the debts and expenses and \$2,000 of legacies, the petitioner is entitled to the use of the remainder of the estate, during her life. Even those averments, if proved, would be insufficient, the amount of the debts not being specified. The order is not, of itself, presumptive evidence of the existence of a fact essential to the jurisdiction of the surrogate to make the order. Jurisdiction cannot be acquired by assuming it.

But if that difficulty could be obviated, another, of an insuperable character, exists in the fact that the bond required by the order, and tendered by the petitioner, does not comply with the statute. By the statute, the bond is to be conditioned for the refunding of the money whenever required, so that the executors may be protected in any contingency, as, for instance, in case the will should be set aside, and they be called to account to the heirs. Such a bond was not required, in terms, by the order, and evidently was not intended to be required, for the bond tendered and approved by the surrogate only requires the money to be refunded, in case it is needed to pay debts or legacies.

We regret to be forced to the conclusion that the order is erroneous, for there is reason to think the petitioner, who is shown to be aged and needy, is able to make a case entitling her to relief, under the statute. But we see no way to avoid a reversal of the present order, with costs to be retained by the executors, out of any moneys in their hands belonging to said petitioner.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

## SARAH HAGADORN, RESPONDENT, v. RICHARD A. KEARNEY, APPELLANT.

*Impeaching character of witness — rebutting testimony — what admissible as.*

Upon the trial of an action for assault and battery, the defendant having called several witnesses who testified to the bad character of the plaintiff, a milliner, who had testified in her own behalf, she was recalled and asked: "How was it as to the better class of ladies in the village patronizing you up to that time?" *Held*, that the question was improper, and that the court erred in allowing it to be put and answered against the objection and exception of defendant's counsel.

APPEAL from judgment in favor of the plaintiff, entered on a verdict rendered at the Orleans Circuit.

Action of assault and battery. Defense, a denial.

*J. H. White*, for the appellant.

*A. G. Rice*, for the respondent.

SMITH, J.:

The defendant having given testimony, by several witnesses, tending to show that according to the speech of people, the general moral character of the plaintiff and her sister, Mrs. Strouss, who had testified as witnesses in her behalf, was bad, the plaintiff, in reply testified that she and her sister carried on the millinery business in Medina, at the time of the alleged assault and battery, and her counsel then put to her this question, "How was it as to the better class of ladies in the village patronizing you up to that time?" An objection and exception were taken, which raise the inquiry, whether the question was competent and proper. If competent at all, it was for the purpose of sustaining the plaintiff and her sister as witnesses, against the impeaching testimony introduced by the defendant. Was it admissible for that purpose? The general rule is, that testimony impeaching the general reputation of a witness may be met by fresh evidence in support of his character, or by evidence attacking the general character of the impeaching witness. In addition to this, the impeaching witnesses may be cross-examined as to their means of knowledge, or the grounds of their

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opinion. (2 Phil. Ev. [4th Am. ed., with C. & H. and Edwards' notes], 955, and note 598, p. 958; 1 Gr. Ev., p. 461.) In *The People v. Mather* (4 Wend., 229), several persons having testified to the bad character of one Gregory, a witness called on the part of the people, the public prosecutor proposed, by way of supporting his credit, to introduce witnesses to show that the reports against him had originated from a particular party or body of men, and were founded on a particular transaction, which had been intentionally perverted to injure his character. The offer was excluded, and the Supreme Court sustained the ruling, on the ground that the testimony would have introduced a collateral issue tending to embarrass and delay the trial, and probably, in no respect, subserving the ends of justice. MARCY, J., in delivering the opinion of the court said, that the proposition was "asking for a greater latitude of inquiry than would be safe to grant. If the main issue formed by the pleadings is to be tried with reasonable expedition, collateral issues must be avoided, as much as possible. These issues are more likely to multiply in ascertaining the interest or testing the credibility of witnesses than in any other incidents of a trial." Fortunately, at this day, questions respecting the interest of witnesses seldom occupy the courts, but the comments of the learned judge, as to the tendency of the multiplication of issues in testing the credibility of witnesses, are as pertinent now as they were at the time when they were written. The present case illustrates their force. The counsel for the respondent attempts to justify the reception of the evidence in question, on the ground that the fact of the good standing and character of the plaintiffs' customers, warrants the inference that in their estimation, the plaintiff's character was good, and in that way it tended to repel the impeaching testimony.

It is not to be assumed, however, that the plaintiff's patrons necessarily knew the general speech of people concerning her, and if that assumption were warranted, the plaintiff had no right to avail herself of testimony that merely raised an inference that her reputation was good. The inquiry was as to her reputation, according to the speech of people, as shown by the testimony of persons acquainted with it. If she had enjoyed the business patronage of ladies of good standing, she could have called them as witnesses to state what they knew of her general reputation, and thus she would

have kept strictly within the issue. But by the course pursued, a collateral issue was presented, as to the number and standing of her patrons, and their opportunity of knowing the speech of people concerning her, which the defendant was not required to be prepared to try.

If the testimony was admissible, it would be equally competent to sustain a witness whose general character is assailed, by showing that he had held a responsible public office, or a place of trust, or that he was a church member in good standing, or in short, by proving any other fact from which a good reputation would ordinarily be inferred.

We are of the opinion that the testimony was improperly received, and we cannot say that it had no influence in producing the verdict of the jury.

For this reason we think the judgment should be reversed, and a new trial ordered, costs to abide event.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

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MARION B. P. WILSON, RESPONDENT, v. CYRUS B. LAWRENCE, INTERPLEADED WITH THE CONNECTICUT MUTUAL LIFE INSURANCE COMPANY, APPELLANT.

*Policy upon life of husband for benefit of wife — not assignable by her — Chap. 277 of 1840.*

A life insurance company issued a policy of insurance upon the life of plaintiff's husband, payable at his death to her, her executors, administrators or assigns, the policy reciting the payment of the first premium therein by her. In fact, the policy was issued upon the application of the husband and the first, and all subsequent premiums were paid by him.

*Held*, that the policy was designed as a provision for the support of the wife during widowhood, and was within the equity of the statute in regard to insurances effected by husbands for the benefit of their wives and children (chap. 277 of 1840, and the acts amendatory thereof); and that an assignment thereof, made prior to the passage of chapter 21 of 1873, was void and incapable of enforcement.



APPEAL from a judgment entered on the decision of the late Mr. Justice RAWSON, at the Ontario Special Term.

Action to recover \$2,500 upon a policy issued by the Connecticut Mutual Life Insurance Company, upon the life of the plaintiff's husband. He died on the 12th September, 1875. Pursuant to an order of the court, the insurers, who were originally made defendants, deposited the money in court, and the present defendant, Lawrence, who claims under an assignment from the plaintiff, was substituted in their place. The contest is between him and the plaintiff; she claiming that the assignment was procured by coercion, and also that it is void on the ground that her interest in the policy was not assignable. The judge at Special Term found that the assignment was not procured by coercion, but he held the assignment void on the ground that the plaintiff's interest was not assignable, and he ordered judgment for the plaintiff, entitling her to the money paid into court.

*H. M. Field*, for the appellant.

*R. P. Willson*, for the respondent.

SMITH, J.:

When this case was before the court on a former appeal (8 Hun, 593), the fact had been found that the consideration for the assignment of the policy to the defendant was \$2,000, received by the plaintiff and her husband. Upon that state of facts it was held that a restitution of the policy to her, and a cancellation of the assignment, ought not to be decreed by a court of equity without requiring her to restore the money so received by her.

At the second trial, now under review, it was found that nothing was paid to the plaintiff, and that the only consideration for the assignment was the cancellation and delivery to the plaintiff's husband, of his promissory notes for \$2,000, held by the defendant. Upon this showing, it is claimed on the part of the respondent that she is entitled to the relief asked, without restoring to the defendant that which he parted with. In our opinion, the equity of the case is not changed by the findings. The uncontradicted evidence shows that the plaintiff signed and acknowledged the assignment, and put

it in her husband's hands, at his request, to enable him to deliver it to the defendant in payment and satisfaction of his debt. The judge found that she was not induced to assign the policy by fraud, undue influence, or coercion. She voluntarily gave to her husband the control of the policy for his accommodation, to pay his debt to the defendant. Although the assignment was directly from the plaintiff to the defendant, that was but the form of the transaction adopted by her and her husband to enable him to effect his purpose. In short, her husband was the principal actor in the transaction with the defendant, and she advanced a part of her separate estate, at his request, to pay his debt, and for such advance she has in equity a claim against his estate. Inasmuch, therefore, as her principal could not cancel the transaction without restoring what he received under it, she is bound by the same rule, and is not entitled as matter of equity to a cancellation of the assignment, unless that which the defendant parted with is restored to him.

These equitable considerations are of no moment, however, if, as the respondent's counsel contends, the assignment was absolutely void. It is insisted that the policy was a special provision made by the husband for his wife's support during widowhood, under the statute of 1870 (chapter 277), and the several acts amending it, and, therefore, was not assignable by him, according to the construction given to that legislation by the courts. This claim presents the principal question in the case, and one not free from difficulty.

The assignment in this case was executed the 2d April, 1873. The act of 1840, as amended by several statutes prior to that date (Laws of 1858, chap. 187; 1862, chap. 70; 1866, chap. 656; 1870, chap. 277), enabled a married woman to cause to be insured, for her sole use, the life of her husband, for any definite period, or for the term of his natural life. The insurance might be effected by herself, and in her name, or in the name of any third person, with his assent, as her trustee. In case of her surviving such period or term, the policy money would be payable to her, to and for her own use, free from the claims of the representatives or creditors of the husband, or any party claiming under him. But such exemption would not apply to the excess over \$500 of the premium paid in any year out of the property or funds of the husband; such excess, with the interest thereon, would inure to the benefit of the husband's credi-

tors. (Laws 1870, chap. 277.) The second section provided that the amount of the insurance might be made payable, in case of the death of the wife before the period at which it should become due, to her husband, or to his, her or their children, for their use, as should be provided in the policy of insurance, and to their guardian, if under age. (Laws 1866, chap. 656.) The Court of Appeals has held, in two separate cases, that a policy issued under that act, for the benefit of a wife, or, in case of her dying before her husband, of her children, is not assignable by her during the life of her husband. The first case (*Eadie v. Slimmon*, 26 N. Y., 9) was decided in 1862. The policy bore date 6th of May, 1852. The report of the case does not show that the policy referred, in terms, to the act of 1840, but its provisions for payment to the wife, for her use, or in case of her death before her husband, to her children, for their use, or to their guardian, if under age, showed clearly that it was framed in view of the statute. The other case (*Barry v. Brune and ano.*, 59 id., 587) was decided in 1875. The policy was issued in 1868, in conformity with the act, as was found by the trial court. Those cases furnish the rule of law for our guidance, and the only question remaining is, whether the policy in this suit was made under the act of 1840. It does not refer to the act, in terms, and its only provision respecting payment is that the company will pay to the assured (the plaintiff), her executors, administrators or assigns. The policy purports to be a contract with the wife, and it recites the payment of the first premium by her. On its face, it is a policy which would have been valid at common law, which recognized an insurable interest of a wife in the life of her husband. But the court found, on the last trial, that the policy was issued upon the application of the husband, and that he paid all the premiums. Those circumstances, and the fact that the policy was not payable till his death, warranted the further finding of the trial court, that the husband designed the policy as a provision for the support of the plaintiff during widowhood. The policy is, therefore, to be regarded as within the equity of the statute, and consequently not assignable. The circumstance that the policy made no provision for children, does not militate against the idea that it was made in view of the statute, as there is no evidence that the plaintiff or her husband had children. These views do not conflict with the decision

on the first appeal, as it there appeared that the premiums were paid by the wife.

It seems that by an amendment passed 23d of June, 1873 (L. 1873, ch. 821), a policy issued under the act of 1840 may now be transferred by the wife, by will or deed duly acknowledged, in case she has no child or issue of a child. But as that act was passed subsequently to the execution of the assignment to the defendant, it does not affect the present case.

A point is made that the order of substitution having been made without notice to the defendant was void, and the court had no jurisdiction. At most, the order was irregular. The defendant waived the irregularity by appearing and answering, and so this court held on the former appeal.

We think the judgment should be affirmed, with costs.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed, with costs.

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NATHAN O. GREENFIELD, PLAINTIFF IN ERROR, v. THE  
PEOPLE OF THE STATE OF NEW YORK, DEFENDANT  
IN ERROR.

*Witness — contradiction of — when allowed — Challenges — review of decision as to —  
evidence upon — Impression as to guilt — when it does not render a juror incompetent.*

A witness may be contradicted not only as to his testimony in chief, but also as to matters drawn out on his cross-examination, material to the issue, especially when the contradictory statements tend to discredit, vary, modify or explain the testimony given by him on his direct-examination.

In reviewing the decision of a trial court upon a challenge to the favor, the appellate court has the power, and it is its duty, to pass upon the facts *de novo*, from the evidence adduced before the court below.

Since the passage of the act of 1873, by which challenges both for principal cause and for favor are to be tried by the court, it is not necessary to reiterate, upon the challenge for favor, the evidence taken upon a challenge for principal cause on the same ground; but the court is to decide upon the testimony given on both challenges.

Where, upon a challenge for favor, it appeared that the person challenged had a preconceived impression as to the guilt of the accused, based upon statements which he had read in an account of a former trial, which statements might or might not be supported by the evidence, but he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression, *held*, that the challenge was properly overruled.

WRIT of error to the Court of Oyer and Terminer, held in the county of Oswego, to review the conviction and sentence of the plaintiff in error for murder in the first degree.

*S. C. Huntington*, for the plaintiff in error.

*J. J. Lamoree*, district attorney, for the defendant.

SMITH, J.:

The record in this case returned to the writ of error, presents a conviction of the plaintiff in error for murder in the first degree committed upon his wife, Alice Greenfield, at Orwell, in the county of Oswego, in October, 1875. The bill of exceptions contains numerous exceptions (over three hundred it was said on the argument), taken on behalf of the prisoner to rulings of the court on questions of the admissibility of evidence. We have examined them all carefully, and are constrained to say that in our judgment they are without merit. Many of them are exceptions taken to rulings of the court admitting certain questions put to the prisoner's witnesses, Richard Greenfield, the prisoner's father, Betsey Ann Greenfield, his mother, and Ezra Greenfield, his brother, on cross-examination, for the purpose of laying the foundation for proving statements made by them contradictory of their testimony. . Another large class of the exceptions taken by the prisoner's counsel, relates to rulings of the court admitting questions put to witnesses called by the prosecution, for the purpose of making the proof of contradictory statements, the foundation of which had been laid as above stated. The ground taken by the counsel for the plaintiff in error, in support of both of the classes of exceptions above referred to; is that the questions admitted by the rulings excepted to, related to new, immaterial and irrelevant matters, in respect to which the witnesses could not be contradicted or impeached. Without taking up the questions separately, it is enough to say, that in view of the testimony given by the prisoner's witnesses above named, on their

direct examination, and in view of the circumstances of the case as shown by the testimony received before the prosecution rested, the matters to which the questions objected to related, were not collateral, but bore with some degree of weight upon the main issue. The bearing of some of them, indeed, was slight, but our attention has not been called to a single one which in our judgment did not relate with more or less directness to some circumstance which, either as a part of the *res gestæ*, or as showing the position of the witnesses, or their opportunities for observation, or their bias or want of recollection, tended to throw light upon the transactions which constituted the essential elements of the case. Whatever tends to contradict or qualify some previous part of the testimony of the witness to whom the question is put is not collateral. (2 Phil. on Ev. [4th Am. ed.], with Cow. & Hill's notes, p. 970, citing 1 Exch. R., 102, per ALDERSON, B.)

It is further objected, however, by the counsel for the plaintiff in error, that in some instances the matters in respect to which evidence of contradictory statements was received, were elicited on the cross-examination of the witnesses sought to be contradicted, and not on their examination in chief. Such was the fact, but we do not understand that any rule of evidence was violated thereby, the matters as to which the witnesses were contradicted being pertinent to the issue. A witness may be contradicted not only as to his testimony in chief, but, also, as to matters drawn out on his cross-examination, material to the issue, especially where the contradictory statements tend to discredit, vary, modify or explain the testimony given by him on his direct-examination. The rule here stated is not new. It is laid down in Wharton's Law of Evidence (§ 552,) and authorities are there cited in support of it. To those may be added the case of *Thomas v. David* (7 Carr. & Payne, 350), cited by Phillips in his treatise on evidence (vol. 2 [4th Am. ed.], with Cow. & Hill's notes, p. 971).

It is further urged by the counsel for the prisoner that his client was prejudiced by the fact that numerous questions were allowed to be put by the counsel for the prosecution to witnesses called for the defense, as to what they had said or sworn to out of court, concerning new and collateral matters, in respect to which no attempt was made to contradict them. As to all such questions,

the answers of the witnesses were conclusive ; the extent to which a cross-examination on collateral matters shall be allowed is very much within the discretion of the court, and there does not appear to have been an abuse of discretion in this case.

Exceptions were taken by the prisoner's counsel to rulings of the court upon challenges to two of the jurors, which remain to be considered.

Augustus H. Betts, a juror, was challenged by the prisoner for principal cause, as having formed and expressed an opinion in relation to the guilt of the prisoner, and after having testified in substance that he had formed and then had an opinion or impression as to the guilt or innocence of the prisoner, and also, that notwithstanding such opinion or impression, he could take the case and decide it fairly according to the evidence, the challenge was overruled. The juror was then challenged to the favor, and on his being further examined, that challenge also was overruled by the court. The testimony given by the juror on the trial of the challenges will be more fully stated presently.

It is enacted by chapter 475, of the Laws of 1872, that the previous formation or expression of an opinion or impression in reference to the circumstances upon which any criminal action at law is based, or in reference to the guilt or innocence of the prisoner, or a present opinion or impression in reference thereto, shall not be a sufficient ground of challenge for principal cause, to any person who is otherwise legally qualified to serve as a juror upon the trial of such action, provided, the person proposed as a juror, who may have formed or expressed or has such opinion or impression as aforesaid, shall declare on oath that he verily believes that he can render an impartial verdict according to the evidence submitted to the jury on such trial, and that such previously formed opinion or impression will not bias or influence his verdict, and provided the court shall be satisfied that the person so proposed as a juror does not entertain such a present opinion as would influence his verdict as a juror. The proposed juror, in this case, swore substantially in compliance with the statute, thus rendering himself a competent juror, so far as the challenge for principal cause was concerned, provided the court was satisfied as in the statute is required. We think in this state of the case no exception can be well taken to the overruling of the

challenge for principal cause, that is, that the proposed juror was not legally disqualified from sitting as a juror in the case.

Upon a challenge to the favor another question arises, and that is, whether the juror in fact stands indifferent between the parties and is not the subject of any bias or prejudice in relation to the guilt or innocence of the prisoner which may interfere to any extent with his deliberations in the jury box. The act of 1872 has no reference to challenges to the favor, but in the following year, an act was passed (Laws of 1873, ch. 427), which provides that "all challenges of jurors, both in civil and criminal cases, shall be tried and determined by the court only. Either party may except to such determination, and upon a writ of error or *certiorari*, the court may review any such decision the same as other questions arising upon the trial." Before the passage of that act, a challenge to the favor was to be determined by triers, unless both parties consented that it be tried by the court, and the decision of the triers, or of the court, as the case might be, was conclusive and could not be reviewed. Now, however, a challenge to the favor as well as a challenge for principal cause must be tried by the court, and the determination of the court thereon may be reviewed.

In reviewing the decision of the trial court, upon a challenge to the favor, the appellate court probably has the power, and it is its duty, to pass upon the facts, *de novo*, from the evidence. The Court of Appeals has recently said in a civil case, that the rule that when there is conflicting evidence, and when there is any evidence to sustain the finding, it is error in the appellate court to reverse the judgment, is not applicable in any case where the appellate court has a right to review the facts. (*Godfrey v. Moser*, 66 N. Y., 250, 252.) But the court was careful to guard and limit the rule there laid down, by the further remark that, "in reviewing the facts, proper deference should be awarded to the judgment of the referee" (or court) "in cases of serious doubt, upon conflicting evidence, especially when it is probable that the appearance of the witnesses, or their manner of testifying, was, or might have been, controlling in determining the questions; but," continues the court, "these cases are rare, and, in general, it is the duty of the appellate court to take the responsibility of examining the evidence and determining the facts for itself." The remarks above quoted, although made in a civil case, are perti-



nent to the present inquiry, since the act of 1873 relates to civil and criminal cases alike. But the case of a challenge to the favor is peculiarly one in which the appearance and manner of the witness, especially if, as in this case, the only witness is the juror himself, always may be, and frequently is, controlling in determining the question to be tried. It is competent for him to testify as to his impressions and opinions, the degree of their strength, and his ability to lay them aside, and to render an impartial verdict upon the evidence; and, when the challenge is submitted upon his testimony alone, I venture the opinion, in which I think all who have had experience in presiding at jury trials will concur, that a careful observation of the appearance and manner of the proposed juror, under the scrutiny to which he is subjected, is of very great importance, and may frequently furnish evidence respecting his indifference, quite as satisfactory as the words uttered by him on the stand. The wisdom of the legislature, in transferring the grave responsibility of determining challenges to the favor, from laymen to experienced judges, is not to be discussed in the courts. While the statute stands, the proper administration of justice, and the due enforcement of the law, in criminal cases, requires that the determination of a trial court, upon a challenge to the favor, shall not be reversed upon any thing short of a reasonable conviction upon the part of the appellate court, grounded upon the evidence, that the determination was erroneous.

The answers given by the proposed juror, Betts, upon the challenge for principal cause, as well as those given upon the challenge to the favor, were before the court when the latter challenge was decided, and, in our opinion, are to be considered by us upon this review. Before the act of 1873, when challenges for principal cause were decided by the court, and those for favor by triers, there was an obvious reason for holding that testimony addressed to one tribunal could not be considered by the other (*Cancemi v. The People*, 16 N. Y., 501, 505), unless by consent, as seems to have been the case in *Friery v. The People* (2 Abb. Ct. Ap. Dec., 215; S. C., 2 Keyes, 424). Now, however, both challenges being tried by the court, it would be a mere waste of time to reiterate upon the challenge for favor, the testimony taken on the challenge for principal cause; and we think it is to be presumed that the challenge for

favor, being taken subsequently to the challenge for principal cause, was determined upon the testimony given on both challenges, when, as in this case, it does not appear that any objection was taken to that course, or that a different course was adopted, and counsel on both sides have argued before us the question relating to the challenge for favor, on all the testimony of the juror.

It appears from the bill of exceptions that the juror Betts testified, in substance, that, at the time of a former trial of the case, he read a newspaper account of the evidence given by the prosecution, or a part of it, and he heard the matter considerably discussed by others; that, from what he heard and read, he formed an impression as to the guilt of the prisoner, which he still retained; that such impression was founded upon the assumption that the statements which he read were true; and that notwithstanding such impression, he believed that if he should sit in the case he could render a fair and impartial verdict upon the evidence. If that were all of his testimony, it could not be doubted that the determination of the trial court upon the challenge for favor, as well as the challenge for principal cause, was well warranted, and should be affirmed.

But the counsel for the plaintiff in error contends that, in view of other statements made by the juror during his examination, the court erred in holding him to be indifferent. After the juror had stated the formation of the impression above mentioned, he was asked, "Have you any impression or opinion now?" He answered, "I think I have." Q. "And you have such impression, opinion or belief as to his guilt that it would take evidence to remove it, have you not?" A. "Yes." Q. "So you would not stand indifferent or unbiassed as between the parties?" A. "I don't know how that would be." Having testified, in reply to questions by the district attorney, that the effect formed on his mind was an impression and nothing more, and that he believed, notwithstanding the impression, he could render an impartial verdict upon the evidence, he was asked by the prisoner's counsel, "What you mean by that is this, isn't it: that if you were sworn as a juror, you would endeavor to weigh the testimony impartially and render a verdict accordingly?" A. "Yes." Q. "That is all you mean by that?" A. "That is all I mean, yes." Q. "But you do not mean to take back what

you have already said, that you would enter upon your duties as a juror, if sworn, with an impression or belief as to his guilt?" A. "I should have the impression, as I said before." Q. "And that would require evidence to remove?" A. "Yes." Subsequently, the court put to the juror this question: "Do you think that your previously formed opinion or impression would not bias or influence your verdict at all?" A. "I think it would not." Q. "You could take the case and decide it fairly according to the testimony, without reference at all to any opinion you might have had?" A. "Yes."

It seems to us that these answers properly considered in connection with all the testimony of the proposed juror, do not substantially vary what he had previously stated. He nowhere says that he had formed an opinion. He had formed an impression, but it was hypothetical, based upon the assumption that the statements he had read were true. When he speaks of an impression which it would require evidence to remove, the natural import of his language is that if the statements on which his impression was based should be borne out by the evidence, further evidence would then be required to remove the impression. His uncertainty as to whether he would stand indifferent, was simply that arising from the doubt whether the evidence would bear out the statements on which his impression was based. His answer upon that point showed very clearly that he had no fixed opinion. (*Stout v. The People*, 4 Park. Cr. R., 132, *per* T. R. STRONG, J., 137.)

In short, the substance and import of his testimony was that he had a preconceived impression, based upon statements which might or might not be supported by the evidence, but that he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression. It is not to be forgotten that the juror was a layman, and presumably not acquainted with the technical legal signification which has been given to some of the words used in the questions put to him. His language is to be construed as it would ordinarily be understood by laymen of common intelligence sitting as triers. And I cannot forbear to quote an eminently wise and practical remark made by Justice E. DARWIN SMITH in the case of *The People v. Stout* (4 Park. Cr. R., 71, 124), which, although uttered on the review of a determination of a challenge for principal cause, is entirely pertinent to the present

case: "Human language," said the learned judge, "is so imperfect at best as a representative of thought, and written language so much more liable to misrepresentation and misconstruction, when considered and reviewed by itself remote from the time and occasion when it was used, and there is also such a liability to misunderstand or misquote a witness or juror, that it is altogether more safe and just to the juror and the cause of truth, to trust to the impression made at the time by the testimony upon those who heard it, noticed the manner, tone, appearance and personal peculiarities of the juror while under examination and subjected to the watchful scrutiny of the court, counsel and jury in the court room, than to any written or reported statement of his testimony afterwards."

Before the act of 1873, although the determination of the triers on a challenge for favor was conclusive and could not be reviewed, cases frequently came up for review, upon exceptions to rulings of the court on questions of evidence before the triers. In such cases, when the appellate court had before them all the evidence submitted to the triers, they sometimes expressed an opinion as to the correctness of the decision of the triers upon the question of indifference. In repeated instances the courts have expressed an opinion as to what kind and degree of evidence will properly sustain a challenge, and it may be profitable to refer to some of them.

A marked case of that description is *The People v. Honeyman* (3 Den., 121), in which the former Supreme Court took occasion to explain what they had said on the subject of challenges to jurors in *The People v. Bodine* (1 id., 281). In Honeyman's case the court, after adverting to their language in the Bodine case, proceeded as follows: "If we have not been sufficiently explicit already, recent events render it proper to add, that although evidence which tends to show a bias on the mind of the juror must be received, it by no means follows that the juror should be set aside by the trier for slight causes. If, for example, the juror has heard, or has read in a newspaper, that the prisoner is guilty of the crime laid to his charge, and has given credit to the statement, the evidence of those facts must be received; and the triers must not be instructed, as matter of law, that they are not at liberty to reject the juror. Still, it would not be a wise or judicious act on their part to set aside the juror, unless they found that he had such a

settled opinion concerning the prisoner's guilt that he could not disregard what he had heard or read out of court, and render his verdict on the evidence alone." \* \* \* "It is well known that jury duty in the city of New York" (the original venue in Bodine's case), "is somewhat burdensome; and persons summoned as jurors for a trial which is likely to occupy a good deal of time, will be very willing to say, if it can be done truly, that they have heard or read statements, and formed opinions concerning the prisoner's guilt. But a little sifting would probably show, and well-instructed triers would undoubtedly find, that they were not disqualified to sit as jurors. Intelligent and right-minded men, when they enter the jury-box, know how to lay aside what they have heard and read out of doors, and pronounce their verdict upon the evidence, and upon that alone."

Another instructive case is that of *The People v. Lohman* (2 Barb., 216, 222). One Cortelyou, called as a juror, was challenged to the favor by the defendant's counsel. On his examination he stated that he had an opinion unfavorable to the general character of the defendant, and that he had formed and still retained an impression that if what he had read in the papers was true, she had committed the act charged. He was then asked by the counsel for the people, on his cross-examination, against an objection and exception by the defendant, whether, if he should be sworn as a juror, he would disregard what he had heard or read out of court, and render a verdict on the evidence. The juror answered that he would endeavor to do so to the best of his ability. The triers decided against the challenge, and the juror was then sworn. The defendant was convicted, and on error to the Supreme Court, the exception above stated was passed upon and the court said, "It is not, in general, sufficient to justify the triers in setting aside a juror, as not indifferent, that he has formed an unfavorable opinion of the character of the accused. If it should be, notorious offenders could not be tried at all. Whether it would be a valid objection that he had read a report of the facts in the public papers, and had thereby imbibed an impression against the accused, must, of course, depend upon the strength of such impression. If that should be weak, it would not disqualify the juror. If, however, it should be so strong that it would have any influence in forming his opinion on the trial,

then he would not stand indifferent, and should be rejected. The juror should be able to decide on the evidence alone. Now, there is no one better acquainted with the strength of the impression upon the mind of the juror than himself. Indeed, all the information given to the triers upon the challenge, is generally from the juror. He was in this case, the sole witness. The question to which objection was made, was proper to test the strength of the juror's impression against the defendant. The answer was such as any honest man would have made, and could not have operated to the defendant's prejudice. The triers were bound to give it such weight as they thought right, and they very properly decided that the challenge was not true."

In *O'Brien v. The People* (36 N. Y., 276, 278), there was a conviction for murder in the first degree. A juror, Bleekdorn, was challenged for favor, and the challenge having been tried by the court, without objection, and overruled, the defendant's counsel argued, on review, that the challenge was improperly overruled. The Court of Appeals passed upon the question. BOCKES, J., delivering the opinion of the court, said, "The juror was called and challenged to the favor; on being examined, he stated that he had a faint recollection of hearing of the occurrence through the newspapers at the time, but formed no opinion or positive decision as to the guilt of the prisoner; that the newspaper statement left no particular impression on his mind as to the guilt of the person named, except as a newspaper statement; that he believed a homicide had been committed, and by the person named. This is the substance and import of his examination. It is plain that the challenge was not supported. It did not appear that the juror was prejudiced against the prisoner, or had formed an opinion as to his guilt or innocence from what he had heard or read, and he was clearly competent, unless general impressions obtained from reading newspaper accounts of the daily events occurring in our midst will disqualify the reader from judging impartially of them when brought under examination on sworn evidence in a court of justice. It has been often held that impressions so made do not disqualify a person from sitting as a juror. (2 Barb., 222; 1 Park., 302; 2 id., 16; 4 id., 132, 135-37; 5 id., 414, 423-25.) Were a different rule to obtain, the most intelligent and upright portion of community

would be generally excluded from the jury-box, leaving cases of the highest importance to individuals and to community to be determined by the most ignorant and least competent."

In the cases cited, the evidence in support of the challenge was quite as strong, to say the least, as in this case. In the present case the trial court undoubtedly came to the conclusion that, although the juror had formed an impression as to the guilt of the prisoner from what he had heard and read, the impression was hypothetical merely, and the juror was able, notwithstanding its existence, to decide the case fairly and impartially upon the evidence, and upon that alone. Looking at all the testimony given by the juror, and the apparent intelligence and candor evinced by his answers, and considering the fact that the trial court had the opportunity of observing his manner and appearance on the stand, we are of the opinion, in the light of the judicial opinions above referred to, that the determination of the trial court upon the challenge to the juror for favor cannot be said to have been erroneous. To hold otherwise would be to adopt a rule for the application of the statute of 1873, which would virtually annul its provisions, and continue the mischiefs they were intended to prevent, by excluding from the jury-box the fittest to serve, and by admitting to its grave responsibilities and duties those only who are found to be unbiased and neutral, mainly because they cannot or do not read.

A like exception was taken by the prisoner's counsel to the overruling of the challenge for favor, to the juror Jennings. The evidence in his case is so similar to that in the case of Betts, that it is unnecessary to consider it separately. We are of the opinion the ruling upon that challenge, also, was not erroneous.

The conviction and judgment should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment and conviction affirmed, and proceedings remitted to Oswego Oyer and Terminer to carry sentence into execution.

18	254
67	636
18	254
140a	319

WARREN BEVIER, PLAINTIFF, v. THE PRESIDENT, MANAGERS AND COMPANY OF THE DELAWARE AND HUDSON CANAL COMPANY, DEFENDANTS.

*Fire started by sparks from engine—identification of engine—duty of railroad as to condition of engine—Negligence on the part of the plaintiff—duty of, as to putting out fire.*

In an action to recover damages for the burning of woodland, by a fire started by the negligence of a railroad company in allowing sparks and coals to escape from its engines, the plaintiff is not required to prove which one of the defendant's engines set the fire.

Where he is unable to identify the engine that set the fire, by name or number, or by any other designation, if he prove either by the manner in which it was operated or by the extent to which it scattered fire that it was so far out of repair as to charge the company with negligence, it is sufficient.

The counsel for the defendant requested the court to charge that the defendants were not bound to use any other appliances than such as are known in practical use. The court so charged, adding: "that is, the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted to that purpose." *Held*, that the qualification added by the court was proper.

The court charged that the plaintiff was not bound to use extraordinary means to extinguish or prevent the spread of the fire. *Held*, that this was proper.

The defendant's counsel requested the court to charge that, if the plaintiff allowed dry limbs, brush, grass and other combustible matter to lie and accumulate on his premises adjacent to the line of the railroad, and that if such accumulation contributed to produce the fire, by means of which the premises were burned over, he was not entitled to recover. *Held*, that the request was properly refused; that, whether or not the plaintiff had been guilty of negligence contributing to the injury, was a question for the jury; it was not the province of the court to instruct the jury that certain specified acts or omissions constitute negligence.

MOTION for a new trial on a case and exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff. The action was brought to recover damages occasioned by defendants' alleged negligence in setting fire to, and destroying plaintiff's woodland.

*Richards & Sessions*, for the plaintiff.



*Henry Smyth*, for the defendants. The court erred in declining to charge as requested, "that the defendants were not bound to use any other appliances than such as are in known practical use." This is the law, and they had a right to have it charged without qualification. The qualification, "such as are best adapted to that purpose," imposed too severe a rule. (*Lackawanna and B. R. R. Co. v. Doak*, 52 Penn. St., 379; *Myer v. Clark*, 45 N. Y., 285; *Frankfort and B. R. R. Co. v. Phila. and T. R. R. Co.*, 54 Penn. St., 345.) The plaintiff was bound to use all reasonable care and diligence to protect himself from damage from the fire, and it was erroneous to state to the jury that plaintiff's duty was limited to a case "when it was practical for him readily and easily to have stopped the fire." (*Keese v. Chi. and N. W. R. R. Co.*, 30 Iowa, 78; *Kellogg v. Chi. and N. W. R. R. Co.*, 26 Wis., 223; *Shearman & R. on Negligence*, § 335.)

MULLIN, P. J.:

This action is brought to recover damages for negligently setting fire to the woodland of the plaintiff, and destroying part of the wood growing thereon and injuring another part. The defendant's railroad extends from Albany to Binghamton, and passes through the farm of the plaintiff. On the 24th of May, 1871, an engine of the defendant passed over the road, scattering fire from the smoke-stack and fire-pan in large quantities, and soon thereafter fire appeared in a pile of brush on defendant's side of the fence. It extended from thence into a pile of brush on plaintiff's side of the fence and then extended into the plaintiff's woodland, and thus caused the injury complained of. The jury rendered a verdict in favor of the plaintiff for \$298.47. A motion was made for a new trial, which was denied. Time was given to the defendant to prepare and serve exceptions, and they were ordered to be heard in the General Term in the first instance. The General Term in the third department ordered the case to be heard in this department, two of the judges assigned to hold the General Term not being permitted by law to sit in the case.

The case will be most easily disposed of, by considering the exceptions of the defendant in the order they are set out in the points. The first exception is, that the court erred in allowing the

evidence that the defendant changed the stack of the engine Unadilla after the fire. The plaintiff gave evidence, by several witnesses, tending to prove that the fire was set by the engine Unadilla (No. 26), and that its apparatus for preventing the escape of the fire was defective. The defendant called a number of witnesses, who testified that the apparatus of the Unadilla, for preventing the escape of fire, was in perfect order, having been recently put in thorough repair, and that No. 26 did not leave Binghamton the afternoon of the fire, until after the fire was shown to have been set. This evidence made it necessary for the plaintiff to prove, if he could, that it was some other engine of the defendant that caused the fire. Proof was then given that engine No. 13 passed only a short time before the fire appeared upon the side of the railroad adjacent to plaintiff's woodland.

Thomas Seally was called as a witness on the part of the plaintiff, and described the smoke-stack, etc., of the Unadilla, and what repairs, etc., had been made upon it. His evidence tended to prove that it was in good order and not liable to scatter fire. On cross-examination by plaintiff's counsel, the witness stated that shortly after the fire he removed the smoke-stack from No. 26 and put on a different one, different in shape and general outline. The plaintiff's counsel then put the following question to the witness: "Why did you go to the expense of taking one off and putting another on this particular engine?" The defendant's counsel objected to the question, on the ground that the case is to be determined upon the condition of the engine at the time, and that no act of theirs, made even with the object of adding security against fire afterwards, is legitimate to be considered in this case. The objection was overruled and the defendant's counsel excepted. Had this question been put to a witness on the part of the plaintiff, it might be assumed that the object of the question was to prove that the defendant knew the engine to be defective and made the repairs for that reason; such evidence would be clearly incompetent. The question, however, was put to defendant's witness on cross-examination and was competent to test the accuracy of the witness as to the condition of the engine. If it had been repaired as extensively as he represented, the question would be a very natural one why, if that was true, was another smoke-stack put on so soon after the

fire? The question was competent on cross-examination. If the question was incompetent it was not answered. The reason for the change was given subsequently by the witness, but in answer to another and different question, and the question does not appear to have been objected to. The next exception is to the charge of the judge, that the jury were at liberty to find that the fire may have come from the engine No. 13, as to the condition of which there was no proof; and it was claimed that he also erred in refusing to charge, as the fact was, that "the undisputed proof in the case is, that locomotive No. 13 left Binghamton at 10.50 and reached Oneonta at 5.45 that day, and that it was impossible for her to have been here on the afternoon of the eleventh. It was certainly improper for the judge to have said what he did as to No. 13, in his charge, if as he says, speaking of the proof as to her, "I do not know what it is myself."

The plaintiff was not bound to prove which one of the defendant's engines set the fire. To require such proof would, in many instances, deprive the plaintiff of relief. A railroad company is not bound to name or number its engines, and if not named or numbered, or in some other way distinguished from other engines of the company, it would be impossible for the injured party to establish a right to recover. It is incumbent on the plaintiff to prove in an action for injury to property from fire from an engine, that an engine of defendant scattered from its fire-pan or smoke-stack, fire in such quantity and in coals of such size as might kindle a fire and as could not be thrown off from an engine whose smoke-stack, etc., were in proper repair. Upon the evidence the jury had the right to find that engine No. 13, which passed only a short time before, set the fire. (*Bedell v. Long Island R. R. Co.*, 44 N. Y., 367, 369.) If a plaintiff cannot identify the engine, that sets a fire by which he is injured, by name or number or other designation, he must make out his case by showing either by the manner in which it was operated, or the extent to which it scattered fire, that it was so far out of repair as to charge the company with negligence.

The court properly refused to charge that the evidence stated in the offer was undisputed, or that it was impossible, for the reasons assigned, for engine No. 13 to be at the place where the fire was set on the afternoon of the eleventh. It was for the jury to say

whether there is any dispute as to matter testified to by the witnesses, and it not unfrequently happens that before such a charge could be properly made, that the judge would be obliged to read over the whole or a considerable part of the evidence. This would lead to unnecessary delay without any corresponding benefit. The remark of the judge, which the counsel complains of, illustrates the impropriety of requiring the judge to assume to pass upon the extent and weight of the evidence in the cause.

The counsel excepted to the refusal to charge as requested, that the defendants were not bound to use any other appliances than such as are in known practical use, and claimed that the court had no right to qualify it by adding the words "such as are best adapted to that purpose."

FOLGER, J., in *Steinweg v. The Erie Railway* (43 N. Y., 126), held it to be negligence in a carrier of passengers, if it did not adopt the most approved modes of construction and machinery in known use in the business, and the best precautions in known practical use for securing safety. (2 Redf. on Railways, 189.) The learned judge in his charge did not enlarge this rule. The "most approved spark arresters or smoke-stacks," are those best adapted to the purposes to which they are to be applied. To require the company merely to use such apparatus as is in common use, would be a mere evasion of the rule, and in practice exempt carriers in a large number of cases from all liability, as it is known that they sometimes use machines very defective in construction and not well calculated for the use to which they are to be applied, when it is notorious that machines much better fitted for use are in practical use by other railroad companies. The qualification added by the judge, to the charge, was entirely proper, and was a correct application of the rule above-mentioned, laid down by the Court of Appeals.

The defendants' counsel requested the court to charge the jury that defendants' authority to use a steam engine upon the railroad, is an authority to emit sparks therefrom, and if the most approved means, which science and skill have invented and applied to prevent sparks from causing injuries, are employed by the companies charged with negligence, the defendants are not liable in case damages are occasioned by fire communicated from its engine. The learned judge said in reply, I have already charged that

defendants would not be liable for fire caused from sparks which came from the smoke-stack, when that smoke-stack was properly protected by the most approved means which science and skill have invented, and experience has shown necessary to prevent the passage of sparks therefrom, and those means were used with skill and care.

The counsel, in his fourth point, says it was not proper to confine the rule to the smoke-stack, after what he had said as to the fire-box, in his charge, nor was it proper to add that the appliances must be such as experience had shown necessary to prevent the passage of the sparks. It was the duty of the counsel to call the attention of the judge to the omission, in the part of the charge under consideration, of the ash-pan when speaking of the smoke-stack.

It is quite apparent that it was inadvertence if it was of any materiality in the case. No reason is perceived or suggested why the court should have repeated its remarks as to the smoke-stack and omitted to refer to the ash-pan. It is too late now to complain of the omission. It is equally obvious that the learned judge did not intend to charge that the smoke-stack and other appliances must be such as to arrest all sparks; nor is the language, when taken in connection with the whole charge, fairly susceptible of such a construction.

The defendant's counsel excepted to the part of the charge, in which the court told the jury that plaintiff's duty in striving to prevent the spread of the fire was limited to a case where it was practical, readily and easily to have stopped the fire. The court in its charge did use the language which the counsel has incorporated in the exceptions. But when the counsel excepted to that clause of the charge the judge said that what he intended to charge was that he was not bound to use extraordinary means to accomplish that end. The charge, as thus modified and explained, was correct.

The defendant's counsel requested the court to charge, that if the plaintiff suffered dry limbs and brush and grass and other combustible matter to lie or accumulate on his premises adjacent to the line of the railroad and that contributed to produce the fire, by means of which the premises were burned over, he is not entitled to recover. The court refused so to charge and defendant's counsel excepted. It is not the province of the court to instruct a jury that certain specified acts or omissions constitute negligence. That question is for them to pass upon under proper instructions from the

court. If the court could give such an instruction the jury would be bound by it, and thus the court would assume the province of the jury and determine the facts as well as the law.

The defendant's counsel excepts to the rejection by the court of evidence as to how much plaintiff's woodland was depreciated in value by the fire, and how much less it was worth by reason of its having been burned. The measure of the damages the plaintiff was entitled to recover was the difference in value of the timber land as it was before and as it was after the fire. (*Van Deusen v. Young*, 29 N. Y., 36; *Morehouse v. Mathews*, 2 Comst., 514.) The evidence offered did not tend to establish this measure of damages and was, therefore, properly rejected.

The counsel excepted to the rejection of evidence, as to how much the timber was damaged. The evidence was properly rejected for the reason assigned in disposing of the last preceding exception. The counsel refers to the case of *Whitbeck v. New York Central Railroad Company* (36 Barb., 644). That case was decided in 1862, and if the case is in conflict with that of *Van Deusen v. Young* (*supra*) then it is overruled by that case. The property injured, in the case in 36 Barbour (*supra*) was fruit trees, and the same rule of damages cannot be applied to them as to woodland.

The motion for a new trial must be denied and judgment ordered for plaintiff on the verdict.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Motion for new trial denied, and judgment ordered for plaintiff on the verdict.

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CHARLES A. COYKENDALL AND OTHERS, AS COMMISSIONERS  
OF HIGHWAYS OF THE TOWN OF LIVONIA, v. ADELBERT W.  
DURKEE.

*Commissioners of highways—power of, to enjoin purpresture.*

The commissioners of highways of a town have no power to bring an action to enjoin the construction of a permanent obstruction in the highway.

MOTION for a new trial on a case and exceptions, after a judgment dismissing the complaint.

This action was brought to restrain the defendant, by injunction, from erecting a building in, and thus obstructing a highway in the town of Livonia, Livingston county, N. Y. The plaintiffs are highway commissioners of said town, and as such bring this action. The defendant was threatening, and had determined to erect a building in the highway known as Grove street, in said town. The plaintiffs thereupon immediately commenced this action. A temporary injunction was granted, which injunction is still in force. Issue was joined by the service of the defendants' answer, and the cause came on to be tried at the Livingston county Special Term on the 19th day of June, 1876, Justice JAMES C. SMITH presiding. At the opening of plaintiffs' case the defendant moved that the complaint be dismissed, upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and that the plaintiffs as highway commissioners had no power or authority to bring or maintain this action. The court granted said motion and dismissed the complaint, and the plaintiffs excepted to said ruling and decision.

*D. W. Noyes* for the appellant. The only question involved in this case is, have highway commissioners power, under any circumstances, to maintain an action for an injunction to restrain the erection of a permanent obstruction in a public highway? The defendant threatened to create a public nuisance. (*Davis v. The Mayor, etc., of N. Y.*, 14 N. Y., 506, 524; *The People v. Kerr*, 27 id., 188, 193; *Hart v. Mayor of Albany, etc.*, 9 Wend., 571; *People v. Vanderbilt*, 38 Barb., 282; *People v. Cunningham*, 1 Den., 524; *Wetmore v. Tracy*, 14 Wend., 250.) An action will lie by the people to restrain and abate a nuisance upon a public highway or prevent injury to public property. (*The People v. Horton*, 64 N. Y., 610, 616; *The People v. Vanderbilt*, 38 Barb., 282, 287; *The People v. Kerr*, 27 N. Y., 188, 193.) Any unlawful interference with, or obstruction of, a public highway is a public nuisance, whose commission may be punished or prevented either at the suit of the public or of individuals who are damnified. (*The People v. Kerr et al.*, 27 N. Y., 188, 193; *The Attorney-General v. Cohoes Co.*, 6 Paige, 133, 135; Code of Procedure, § 219, sub. 1.) The statute gives the plaintiffs power to maintain the action. (*Edmonds' R. S.*, vol. 2, pp. 494, 495, § 92; *Hill v. Bd. Suprs. of Livingston Co.*, 12

N. Y., 52; *Bartlett v. Crozier*, 17 Johns., 439, 449; Edm. R. S., vol. 1, p. 460, § 1.) It is a breach of duty in highway commissioners to allow a public highway to be devoted to a mere private use. (*Wendell v. Mayor, etc., of Troy*, 39 Barb., 329, 336.) The plaintiffs as commissioners of highways had power to bring this action at common law. (*Supr. of Galway v. Stinson*, 4 Hill, 136; *Overseers of Pittston v. Overseers of Plattsburgh*, 18 Johns., 407; *Todd v. Birdsall*, 1 Cow., 260, 261, and note *a.*) Among other remedies for an obstruction of a public highway, courts of equity will grant an injunction to prevent a threatened or attempted obstruction. (*The People v. Vanderbilt*, 38 Barb., 282, 287; *Attorney-General v. Johnson*, 2 Wils. Ch. 87; *Lane v. Newdigate*, 10 Ves., 192; *Davis v. Mayor of N. Y.*, 14 N. Y., 506, 526; *Corning v. Lowverre*, 6 Johns. Ch., 439; *Attorney-General v. Cohoes Co.*, 6 Paige, 133; Story's Eq., §§ 921, 922.) It is no defense to this action to say that the plaintiffs have a remedy against a public nuisance by indictment and to punish the offender. (Story's Eq., § 923, *et seq.*; *Attorney-General v. Cohoes Co.*, 9 Paige, 133.)

*C. W. Stanton* and *S. Hubbard*, for the respondent. The decision of the court was correct and should be sustained. (*Cornell & Clark v. The Butternuts and Oxford Tpke. Co.*, 25 Wend., 365; *Cornell & Clark v. The Town of Guilford*, 1 Den., 510; *Shipley and others v. The T. and B. R. R. Co.*, 9 How., 83.)

MULLIN, P. J. :

I entertain no doubt but that there are cases in which an injunction will issue to prevent a purpresture in a public highway. It is so laid down in 2 Story's Equity Jurisprudence (section 922), and in sundry cases cited by him, and in Angel on Highways (sections 280 to 283). The difficult question is, who can maintain the action ?

The statutes relating to laying out and repairing highways clothes the commissioners of highways with all the powers that are necessary to enable them to perform all the duties that are imposed upon them, and should a case arise in which their powers are not adequate to a proper and efficient protection of the public rights, it is possible that the attorney-general might proceed in equity. In cities where the fee of the land over which a highway is laid



out, the corporation will obtain relief in equity when it would not be given to a party having no interest in the land, except naked easement or right of passage. (Angel on Highways, § 282.)

The court below was correct in holding that plaintiff could not maintain the action, and the judgment must be affirmed with costs.

Present — MULLIN, P. J., and TALCOTT, J. ; SMITH, J., not sitting.

Judgment affirmed with costs.

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FRANK STONE AND OTHERS, PLAINTIFFS IN ERROR, v. THE  
PEOPLE OF THE STATE OF NEW YORK, DEFENDANTS  
IN ERROR.

*Conspiracy—statements of one conspirator—when admissible against his coconspirator.*

Upon the trial of an indictment against several persons for a conspiracy to cheat and defraud, depositions of one conspirator, taken upon his examination before a justice of the peace after his arrest for the alleged conspiracy, and several months after the accused had ceased to act together in furtherance of the conspiracy, are inadmissible as evidence against a coconspirator.

WRIT OF ERROR to the Court of General Sessions of the county of Orleans, to review the conviction of the plaintiffs in error of a conspiracy to cheat and defraud.

*S. E. Filkins*, for the plaintiffs in error.

*H. A. Childs*, for the defendants in error.

MULLIN, P. J. :

The defendants were indicted in the Orleans Oyer and Terminer for a conspiracy to cheat and defraud Marcia A. McIlrath. The indictment was sent to the Sessions of that county and the prisoners were tried therein in November, 1876. The case made by the evidence on the part of the prosecution is this: In 1875, Mrs. McIlrath was engaged in the manufacture of cigars in Erie, Penn., and employed the prisoner, Stone, to go east and buy tobacco for

her; he went, and on his return told her that he could get Black's tobacco at fifteen cents per pound. She told him to go back and take Black's whole crop at that price, provided Black would give credit for part. Afterwards Stone wrote her that the price of tobacco had gone up to twenty cents per pound and that he had bought the tobacco at that price. She then sent Black a draft for \$510, the price of 2,550 pounds of the tobacco that was first delivered and received. Stone went to Erie and saw plaintiff and told her that Black would wait four months for the balance of the price of the tobacco, if she would give him her note for \$100, to be forfeited if she did not take the balance of the tobacco; she gave the note and finally received and paid for the balance of the tobacco at twenty cents per pound. The business with Black was finally closed on the 10th of November, 1875. Black informed Mrs. McIlrath in the winter of 1875-6, that Stone had charged her more for the tobacco than he had paid, and that he (Black) had paid Stone eighty dollars out of the money received from her. He had agreed to pay Stone \$110 out of the money received for the tobacco if he should sell it for twenty cents per pound. It was only demanded because he had to wait longer for his money than it was understood he should do. Stone bought of Black 2,550 pounds at fifteen cents Black claiming it was worth more, told Stone he would make it all right with him, if he (Stone) should get more for it. Stone told him all he wanted was his traveling expenses; if he (Black) would give him forty or fifty dollars for the 2,550 pounds he would give him twenty cents per pound and fifteen for the residue. He told Mrs. McIlrath that she could have the rest of the tobacco at twenty cents. Black said to Stone, that he (Stone) had got to have something out of it as well as him (Black).

The first point of the counsel for the plaintiff in error is, that it is not alleged in the indictment, that the plaintiffs in error conspired together, to get from Mrs. McIlrath more than the tobacco was worth, nor that it was not worth twenty cents per pound. Stone agreed for the purchase of the tobacco at fifteen cents per pound; Mrs. McIlrath was entitled to receive it at that price, but Stone and Black confederated together to get from her five cents per pound more, and to divide that amount between them. It was of no consequence what the tobacco was worth, honesty and fair

dealing required that Mrs. McIlrath should have the tobacco for the price agreed upon. The indictment contains the only allegation required to describe the offense.

The prosecution, in order to prove that the plaintiffs conspired together to defraud Mrs. McIlrath, offered in evidence the minutes of a justice of the peace before whom Stone was examined, after his arrest for the conspiracy of the plaintiffs in error to defraud Mrs. McIlrath.

The examination was had in February, 1876, and the transaction in reference to the tobacco was closed before the 10th of November, 1875, as at that time the whole of this tobacco was paid for by Mrs. McIlrath. The counsel for the plaintiffs in error objected to the reception of this evidence, on the ground that the statements offered were not a part of the *res gestæ* and therefore the deposition of Black was not evidence against Stone, nor that of Stone against Black, the objection was overruled and the counsel excepted.

Without the deposition of Stone, Black, the plaintiff in error, could not have been convicted. By Black's own evidence it was proved that he did not know that Stone was purchasing for another, and he made a bargain with him to pay him one-half the difference between fifteen and twenty cents per pound, if he should effect a sale of it at twenty cents, and he denied that he sold the tobacco for fifteen cents.

The deposition of Stone was incompetent as evidence against Black. (1 Cow. & Hill's Notes, 177, 179; 1 Greenleaf Ev., §§ 110, 111; *The People v. Davis*, 56 N. Y., 95.) The evidence was given long after the plaintiffs in error had ceased to act in furtherance of the purposes of the conspiracy. For the same reasons the deposition of Black was not evidence against Stone.

It is unnecessary to examine any other of the exceptions taken on the trial. Judgment must be reversed because of the admission of the depositions. Judgment reversed and new trial granted in the Orleans Sessions, to which court the proceedings are remitted.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Conviction and judgment reversed, and new trial ordered in Orleans County Sessions, and proceedings remitted to that court.

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MARY HINMAN, PLAINTIFF IN ERROR, v. THE PEOPLE  
OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

*Court of General Sessions — absence of two justices — power of county judge to receive a verdict.*

The plaintiff in error was tried at a Court of General Sessions for grand larceny.

After the jury had retired to consider their verdict both of the justices sitting with the county judge left the court room, and one of them left the building. While they were absent the jury came in and the county judge received their verdict of guilty. The jury were polled at the request of the prisoner's counsel, without any objection on his part to the reception of the verdict, in the absence of the two justices.

*Held*, that the county judge had no power to receive the verdict and that the conviction or sentence must be set aside.

WRIT OF ERROR to the Court of General Sessions of the county of Ontario to review the conviction and sentence of the plaintiff in error for grand larceny.

*E. W. Gardner*, for the plaintiff in error.

*Frank Rice*, for the defendants in error.

MULLIN, P. J. :

The plaintiff in error was indicted in the Ontario Oyer and Terminer for grand larceny. The indictment was sent for trial to the Sessions of that county, and the case came on for trial at a term of that court held in June last. After the charge by the court, the jury retired to consider their verdict and the county judge commenced the trial of a civil cause. The justices of Sessions, who were members of the court during the trial, left the court room, one of them going into the hall on the lower floor of the courthouse, and the other went into the street. While the justices were absent from the court room, the jury came in and announced that they had agreed on a verdict. The county judge in the absence of the justices of Sessions received the verdict. The jury was polled at the request of the counsel for the plaintiff in error, and

the verdict of guilty was entered by the clerk. Subsequently the plaintiff's counsel made a motion in arrest of judgment, upon the ground that the verdict was improperly received and entered, and upon other grounds not deemed material to be considered on this writ of error. The motion was denied and the prisoner sentenced to imprisonment in the Monroe penitentiary for one year.

The rule is too well settled to be departed from or modified that a verdict must be delivered in open court. It cannot be received privately nor by the clerk or other person in the absence of the court, not even by agreement of counsel. (1 Chitty's Cr. L., 636.) To permit verdicts to be received otherwise than in open court, would lead to the greatest abuses. The people or the prisoner might be grossly wronged without any means of redress, or the administration of the law brought into contempt or subjected to suspicion.

The Court of Appeals in *Blend v. The People* (41 N. Y., 604,) decided that the conviction of the plaintiff in error should be reversed, because one of the justices of Sessions left the bench during the trial, and the county judge appointed another justice of the peace to fill his place, and the trial proceeded before the court thus organized. The learned judge who delivered the opinion of the court, says, when Elwood abandoned the trial the court was disorganized so far as this trial was concerned. This is not the case when members of the court leave the bench for a few moments intending to return, and do return, but is a total abandonment of the trial in consequence of which one-third of the court is changed.

In the case of *The People v. Dohring* (59 N. Y., 374), it was held that a Court of Sessions was not disorganized because one of the justices of Sessions left the bench during the trial, went on to the witness stand and was examined as a witness in the cause. FOLGER, J., assigns as a reason why the irregularity of the justice leaving the bench and being examined as a witness, did not disorganize the court: "That the justice did not leave the court room while the trial was progressing; he did not abandon the trial; he left the bench for a space, intending soon to return to it, and did return." The ruling in the case last cited followed that in *Tuttle v. The People* (36 N. Y., 431), *The People v. Reagle* (60 Barb., 527).

The case now in hand does not come within the principles laid

down in the last two cases cited. In this case the justices of Sessions left, not the court room only, but one of them left the court house. When the verdict was received the court was held by the county judge only, and he cannot, under the Constitution, hold a Court of Sessions. The conviction was, therefore, illegal and must be reversed. The case of *The People v. Shaw* (63 N. Y., 36) is directly in point and decisive of the case. It was suggested by the district attorney on the argument, that the plaintiff in error lost the right to insist upon the defective organization of the court when the verdict was received, because her counsel did not object at the time of the reception of the verdict, on the ground that there was not a court authorized to receive it. I do not suppose it would be seriously urged that the plaintiff has lost her right to insist upon the objection to the organization of the court, if the county judge had alone proceeded to try her for the crime alleged in the indictment. It would be no more a court than, if it was held by any respectable gentleman in Ontario county. Silence does not confer jurisdiction over the subject-matter in a civil or criminal action or proceeding. Receiving the verdict was one, if not the most important of the proceedings during the trial. It must be received by the court before which the trial was had, and if not the verdict is a nullity, and not authority for the sentence. The conviction must be reversed and a new trial had in the Ontario Sessions, to which court the proceedings are remitted. The question can be there considered whether the former trial prevents a second one.

The district attorney has not considered it on his points, and we cannot consider it without he has an opportunity to be heard.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Conviction reversed and new trial granted in Ontario Sessions, to which proceedings are remitted.

CHARLES E. UPTON, APPELLANT, v. THE NEW YORK AND ERIE BANK, GEORGE S. HAZARD, RECEIVER OF SAID BANK, THE ERIE COUNTY SAVINGS BANK AND THE BUFFALO SAVINGS BANK, RESPONDENTS.

*Chap. 371 of 1875—priority given to deposits made by savings bank with other banks—applies to deposits made prior to 1875, and interest thereon.*

13h	269
d 70 AD	*586
18h	269
e172 NY	*380

Section 48 of chapter 371 of the Laws of 1875, providing that the assets of any insolvent bank shall, after payment of its circulating notes, be applied to the payment of any sums that may have been deposited with it by any savings corporations, applies to deposits made by savings corporations prior to, as well as to those made after the passage of the said act.

An agreement was made between the New York and Erie Bank and a savings bank, by which the former agreed in consideration that the said savings bank would deposit its moneys with it, that it would pay all such deposits as had been or should thereafter be made on call, and in such sums as said savings bank might require, with six per cent interest. The president and cashier of the bank individually guaranteed the performance of the contract. Deposits were accordingly made in pursuance of said agreement, and a pass book similar to those given to ordinary depositors was given to the savings bank.

*Held*, that this was not a *loan* of the money to the bank, but a *deposit* within the meaning of that term as used in the aforesaid act.

*Payne v. Gardiner* (29 N. Y., 146), followed.

The preference given to the deposits themselves also extends to the interest due upon them.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

The New York and Erie Bank was incorporated under the general banking law of this State, passed in 1849, having all the powers conferred by that act on corporations created under it. It was located and did business in the city of Buffalo until the 6th of September, 1875, when it became insolvent, and the defendant Hazard was appointed its receiver. The Erie County Savings Bank and the Buffalo Savings Bank were duly incorporated and doing business in Buffalo, and had been for several years prior to the commencement of this action.

On the 20th of May, 1868, an arrangement was entered into between the New York and Erie Bank of Buffalo and the Erie

County Savings Bank, by which the former agreed, in consideration that the said savings bank would deposit its moneys with the latter, it would pay all deposits which it had made or should thereafter make on call, and in such sums as said savings bank might require, with six per cent interest. The president and cashier of the New York and Erie Bank, in their individual capacities, guaranteed to the savings bank the performance of the agreement of the New York and Erie Bank.

On the 4th of September, 1866, the New York and Erie Bank entered into substantially the same arrangement with the Buffalo Savings Bank, and the performance of that agreement was guaranteed by its president and cashier, in their individual capacities, in writing under their hands and seals.

Both savings banks made deposits with the New York and Erie Bank subsequent to their respective agreements down to the 7th of May, 1875. On that day the New York and Erie Bank was indebted to the Erie County Savings Bank in the sum of \$20,000, for money deposited with it. And it was indebted on the same day to the Buffalo Savings Bank in the sum of \$20,000. On the day last mentioned the legislature passed an act to conform the charters of all savings banks to a uniformity of powers, etc., and to provide for the organization of savings banks and for other purposes.

By the twenty-seventh section of said act the trustees of savings banks were authorized to deposit a certain portion of the moneys deposited with them, in any bank or banking association in this State organized under any law of the State.

By the forty-eighth section it is provided that all the assets of any bank or banking association that shall become insolvent shall, after providing for the payment of its circulating notes, be applied by its officers or receivers, in the first place, to the payment in full of any sums deposited therewith by any savings corporation, not exceeding the amount that the savings bank is by law authorized to invest in banks or banking associations.

Prior to the 7th day of September, 1875, the Erie Savings Bank had reduced its deposit to the sum of \$16,300. The amount due from the New York and Erie Bank to the Buffalo Savings Bank was not reduced between the 17th of May and 6th of September, 1875, but was increased by the accumulation of interest to that date.



The Savings Bank received from the New York and Erie Bank pass books such as were delivered by it to its other depositors. No deposits were made by either savings banks after the 19th of May, 1875. On the 6th of September, 1875, the firm of Delano & Co. were creditors of the New York and Erie Bank in the sum of \$14,605.85. On the 17th of May, 1875, Delano & Co. were creditors of the New York and Erie Bank in the sum of \$4,164.82; and between that date and the sixth of September, they had deposited the sum of \$38,939.02, and had drawn out \$29,839.10; and on the 8th of June they had a balance to their credit of \$1,632.02. On the 11th of May, 1876, Delano & Co. recovered a judgment against the New York and Erie Bank for \$14,685.85, damages and costs, and on the same day assigned the same to the plaintiff.

The savings banks claim and insist that they are entitled to receive from the assets of the New York and Erie Bank, the whole balance due them as depositors in said bank, with interest, till the date of such payment. The plaintiff and other creditors of the New York and Erie Bank, of whom there is a large number, claim and insist that the savings banks are not entitled to a preference in payment for moneys deposited before the passage of the act of 1875, but are entitled to a *pro rata* share with the other creditors of the insolvent bank. The receiver not yielding to the claim of the plaintiff, this action was brought in order to obtain the judgment of the court that the receiver shall not allow the claim of the savings banks to a preference for the whole amount of their indebtedness, and directing him to pay, as claimed by the plaintiff, to said banks and the other creditors of said insolvent bank as above stated.

After hearing the parties, the court at Special Term ordered judgment, that the receiver pay to the savings banks the amounts due to them with interest, in preference to all other claims, and dismissed plaintiff's complaint with costs.

The plaintiff appeals.

*A. G. Rice*, for the appellant.

*G. W. Clinton*, for the Erie County Savings Bank, respondent.

*O. H. Marshall* and *Spencer Clinton*, for the Buffalo Savings Bank, respondent.

MULLIN, P. J. :

In order to arrive at a satisfactory solution of the questions arising on this appeal, it is necessary to determine whether the delivery of the money by the savings banks to the New York and Erie Bank was by way of loan or deposit, as if it was the former, the banks are not entitled to a preference in payment by the receiver. (*Rosenback v. The Manufacturers and Builders' Bank*, 17 N. Y. S. C. [10 Hun], 148.)

It will be seen that the New York and Erie Bank and the savings banks entered into an agreement for deposits by the latter in the former. Loans are not mentioned, nor does it appear that they were contemplated. Pass books such as were given to all other depositors were delivered to, and used by, the savings banks. The parties obviously understood that the moneys of the savings banks were left with the New York and Erie Bank as deposits, and not otherwise. I had occasion in the case of *Payne v. Gardiner* (29 N. Y., 146) to attempt to draw the distinction between a loan and a deposit, and I came to the conclusion that such a distinction exists, and it is unnecessary to repeat the views there expressed; and within the principles decided in that case, the transactions between the New York and Erie Bank and the two savings banks were deposits and not loans.

It is urged by the appellant's counsel that under the provisions of the act of 1875, the savings banks are not entitled to a preference for any deposits made prior to its passage. The act makes no such distinction. Preference is given for all sums deposited without regard to the time of making the deposit. It is urged, however, that in construing the statute it must be held to operate prospectively and not retrospectively, and hence all deposits made prior to its passage must be held not entitled to a preference under it. The act was intended to, and in terms does apply to all existing savings banks, and to all that should thereafter be created. It alters existing charters; it brings all savings banks under one uniform system, and requires all to conform to the new conditions and provisions. There is not a particle of evidence in the act, that all or any of the provisions of it should not operate upon all existing banks and upon all their operations. It was within the power of the legislature to give the savings banks the preference; it violated no con-

tract; it disturbed no vested right. It had the power to alter and amend the charters of these institutions at pleasure, and as it was competent for the New York and Erie Bank to give to the savings banks this preference, the legislature could authorize and compel the insolvent bank or its receiver to give the preference.

The savings banks are entitled to have a preference for the interest upon the deposits. The interest is an incident of the debts, grows out of them, and, when due, is a part of them. No reason is perceived why a distinction should be made between them.

The judgment must be affirmed with costs.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed with costs.

JOHN C. DERBY, ON BEHALF OF HIMSELF AND ALL OTHER CREDITORS INTERESTED UNDER THE ASSIGNMENT OF TIMOTHY CHAPMAN, APPELLANT, v. JUSTUS YALE, CALEB B. CORSER, AS ADMINISTRATOR, ETC., OF FRANCIS E. CHAPMAN, JOHN CHAPMAN AND TIMOTHY CHAPMAN, RESPONDENTS.

13	273
156a	511
157a	181
13	273
39ap	294
13h	273
62a	4129

13h	273
40	Mls 609

*Action for an account — former accounting must be pleaded, to be a bar to — not a bar unless judgment was entered — “Stale demands” — power of court to refuse to enforce — Action brought by one creditor in behalf of himself and others — who bound by.*

This action was brought by a judgment creditor of one Timothy Chapman, in behalf of himself and of all other creditors who might join therein, to compel the assignees of said Chapman to render an account. Upon a hearing before a referee the counsel for the defendants insisted that the action could not be maintained, for the reason that a former accounting had been had between the creditors of the said Chapman and the assignees.

*Held*, that such former proceedings should have been set up in the answer, and that, not having been pleaded, they could not be proved in bar of the present action.

The referee had made his report in the former action and the same had been filed, but no judgment had been entered thereon. *Held*, that until a judgment had been entered the former action could not be pleaded as a bar to the present one. Although, in former times, courts of equity have refused to enforce “stale demands,” yet since the adoption of the Code prescribing limitations for both

legal and equitable actions no court can refuse to entertain an action on account of the staleness of the demand, providing it be brought within the time prescribed by the statute.

Where an action is brought by some of the creditors of a debtor, in behalf of themselves and all others similarly situated who shall come in and contribute to the expenses of the action, none but the plaintiffs therein acquire any vested interest in such an action, or are bound thereby, until a final judgment has been entered therein.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

The action was brought by the plaintiff, a judgment creditor of one Timothy Chapman, in behalf of himself and all others similarly situated, to compel the assignees of the said Chapman to render an account, and also to set aside certain conveyances of portions of the assignor's property, alleged to have been fraudulently conveyed to one John Chapman by said assignees.

*H. H. Woodward and J. C. Cochrane*, for the appellant.

*George F. Danforth*, for the respondents.

MULLIN, P. J.:

The plaintiff brought this action in behalf of himself and such others of the creditors of Timothy Chapman, as should come in and contribute to the expenses of the suit to compel the defendants, Justus Yale and Caleb B. Corser, as administrators of Francis E. Chapman, to account for moneys received by said Chapman, Yale and one James C. Campbell, as the assignees of one Timothy Chapman, and to compel the defendant John Chapman to deliver to a receiver for the benefit of the plaintiffs and other creditors of said Timothy, property that belonged to the said assignees and which had been fraudulently transferred to him.

Timothy Chapman, in August, 1853, was a merchant residing and doing business in Rochester, and being largely indebted and unable to pay his debts in full, did, on the tenth day of that month, make an assignment of his property for the benefit of his creditors. The assignees accepted the trust, sold the assigned property and realized therefrom some \$60,000. The plaintiff holds by assignment several judgments against Timothy Chapman, and it is to obtain payment of those judgments that this action was brought.

It is alleged in the complaint that the assignees failed to apply the assets received under the assignment to the payments provided in the assignment, and that a large sum, to wit, \$20,000, was in the hands of Chapman, one of the assignees, which he neglected to apply to the payments of the creditors of said Timothy Chapman, but on the contrary, fraudulently transferred the same to the defendant John Chapman.

Campbell, another of said assignees, was dead when the action was commenced and his estate is insolvent, and Chapman, another of said assignees is dead, and his estate is said to be insolvent; but the referee says in his report, that the insolvency of his estate is not proved before him. Yale and the administrator of Francis E. Chapman, the only persons who appear claiming to represent the assignees, deny that they neglected to pay the creditors provided for in the assignment to the extent of the means realized from the assigned property, and insist that they paid some of the creditors out of their individual property.

It is claimed, by way of defense, by the defendant Yale, that, in 1856, Daniel Graves, a creditor of said Timothy Chapman, the assignor, in behalf of himself and other creditors of Timothy Chapman, commenced an action in this court against the assignees for an accounting and payment of their debts out of the assets in the hands of said assignees; that Graves subsequently died and one Blossom was substituted in place of Graves as plaintiff, and that Yale and Francis E. Chapman appeared in the action and such proceedings were had that it was referred to a referee to state the account between the assignees and the creditors; and the parties appeared before him and were heard by counsel, and the referee made a report, by which he found that the defendants, the assignees above named were liable to the plaintiff in that action, to the amount of the claim held by him, by reason of said assignees having paid that sum to creditors in a class of creditors, whose debts were, by the assignment, not to be paid until after the payment of the class in which such claimant's debt was included.

After this report was made and delivered, an agreement was entered into between Blossom, Yale and Clark, the assignees of a judgment that Martin had recovered against Yale, and one Stewart, the assignee of a judgment against Timothy Chapman, in favor of

one Chancey, whereby it was agreed that Yale should pay \$2,000 and the costs of the suit, and Yale was to be discharged from liability as assignee; the arrangement was not to discharge the liability of the other assignee, nor was it to operate as a discontinuance of the action of Blossom. Blossom, Stewart and Clark executed under their hands and seals a release in accordance with the above agreement to Yale, and delivered the same to him.

While the action was pending before the referee he issued a summons underwritten, notifying the creditors of Timothy Chapman of the pendency of the matter before him, and of the time and place at which he would hear the parties. No judgment was entered on the report of the referee, nor has any thing been done in the action since the report was made.

The defendant, John Chapman, denies having any property, belonging under the assignment, obtained fraudulently. After the recovery of the judgment held by the plaintiff in this action, an agreement was entered into between him and Timothy Chapman, by which the plaintiff agreed to advance money to Timothy, to be used by him in buying up judgments recovered against Timothy, to be assigned when purchased to the plaintiff to be held and enforced by him; and what should remain of the avails, after paying to plaintiff the money advanced by him, and a debt due to him from Timothy and a certain amount for compensation for his services under said agreement, should be paid to said Timothy. The judgments held by plaintiff and to enforce payment of which this action is brought, were transferred pursuant to this agreement.

The referee to whom the issues in this action were referred for trial, finds among other things, that transfers of property by Francis E. Chapman to John Chapman, were made for a valuable consideration. The referee finds that there was an accounting in the action brought by Blossom, and that Yale was released by all the creditors of Timothy Chapman who appeared in that action, with the knowledge and consent of said Timothy. The books and papers relating to the assignment have been accidentally destroyed. The referee says in his report that it does not appear by the proofs before him that any moneys have been received by either of the assignees since the accounting, nor that any property belonging under the assignment, has come to their hands since that time, nor that either of

the assignees have retained any money belonging to the assigned estate, nor that they have been requested to render a new account, nor that Yale is insolvent, nor that Campbell, the other assignee, died insolvent or intestate, or that execution had been issued on either of the plaintiff's judgments, or that any one of the conveyances or transfers was fraudulent or made with any fraudulent intent. The referee held that plaintiffs were not entitled to another accounting.

The accounting demanded in the complaint in this action is resisted on the ground, hereinbefore stated, that there was an accounting in the former action between the creditors of Timothy Chapman and his assignees, and that the creditors are thereby precluded from having another. If such former accounting is a bar, it should have been pleaded, and not being pleaded, the defendants are not entitled to prove such action and accounting in bar of the present suit. (1 Wait's L. and P., 948.) But such former accounting is not a bar, no judgment was entered in it, and without a judgment it cannot be a bar to a subsequent action. (1 Chitty P. [11 ed.], 582, 544, 478 ; note c, 636; 637.) Except in courts that do not possess the power of setting aside their own judgments or of granting new trials, no evidence will be received to establish a former judgment except the record itself. (*Croswell v. Byrnes*, 9 Johns., 287, 290.)

The respondent's counsel seeks to avoid the effect of the rule requiring proof of a judgment, in order to defeat a recovery in this suit, by suggesting, first, that the demands of the plaintiff are stale demands and ought not to be enforced in a court of equity. The Court of Chancery in this State, prior to the adoption of the Revised Statutes, in 1829, did refuse relief to persons seeking to enforce stale claims, as they were called, but at that time there was no statute of limitations requiring suits in that court to be brought within a certain limited number of years from the time the right of action accrued, unless a limitation may have been applied in a few cases. By the Code, a limitation is provided for both legal and equitable causes of action ; and it is not competent for any court to refuse a party the benefit of such limitations. To do it would be to repeal or alter the statutes by judicial legislation.

Second. The counsel says the relief prayed for ought not to be granted, because the plaintiff is joint owner of the judgments sought

to be enforced, with Timothy Chapman, the assignor in the assignment mentioned in the complaint, and that plaintiff ought not therefore be permitted to have an accounting. I am not prepared to say that the arrangement referred to is unlawful; it would seem to be a roundabout way for compromising Chapman's debts. The creditors received for their claims, which they assigned to plaintiff, an amount with which they were satisfied at the time, and neither the assignees of Chapman, nor other creditors, have any right to complain. But, should there be another accounting, the question whether the whole or only part of plaintiff's claim can be allowed, will properly arise, and can then be determined, after a fuller examination of it than it has received on the argument of this appeal.

Third. It is further insisted that the plaintiff, or those he represents, are bound by the former accounting, because the referee issued a summons requiring Timothy Chapman's creditors to appear before him at a time and place named; and that the creditors were thereby made parties to the action. I do not understand the law as stated by the counsel. On the contrary, it is held in *Duffy v. Duncan* (32 Barb., 587), that in order to bind persons not parties, by a judgment in an action brought by the plaintiff in his own behalf, and of such others as should come in and contribute toward the costs, they must make themselves parties by proving their debts, or in some other way, in conformity to the practice applicable to such cases; and in the same case, on appeal to the Court of Appeals (35 N. Y., 187), LEONARD, J., said there had been no final decree, and of course no accounting.

It was held in *Mattison v. Demarest* (1 Robt., 717) that no other creditors of a debtor acquire any vested interest in any action brought by some of his creditors against him and others, on behalf of themselves and all others similarly situated who shall come in and contribute to the expenses of such action, except those by whom such action shall be instituted, until after judgment in the action. No judgment being entered in the former action, no one except those who were named in the complaint as plaintiffs, were parties to it or bound by it.

In *O'Brien v. Browning* (49 How. Pr. Rep., 110), it is held that until an order or judgment has been entered in the action brought by plaintiff in behalf of themselves and all others who come in, under



which they can come in and prove their debts, no creditors other than the plaintiff in the action are authorized to interfere in the suit. If this proposition be law, then the plaintiff was never a party to the action nor bound by the proceedings before the referee.

In *Innes v. Lansing* (7 Paige, 583), the chancellor held that until a decree in an action brought in behalf of plaintiff and others, the plaintiff could discontinue the suit and the defendant could compel a discontinuance on satisfying the claim of the plaintiff, and, in such a case, until decree, any other creditor may commence an action. (See, to same effect, *Tremain v. Guardian Mutual Ins. Co.*, 11 Hun, 286.)

Fourth. It is further suggested that no accounting should be ordered, because two of the assignees are dead, and the books and papers pertaining to the assignment are lost or destroyed. If it rested in the discretion of the court whether an accounting should be ordered, we might, in view of the lapse of time and the embarrassments surrounding the case, deny an accounting, but the right is a legal one and the court has no power to refuse to order it, if a case for it is established on the part of the plaintiff. No reason is produced why resort was had to a second action to obtain an accounting by the assignees. The former suit has never been discontinued; on the contrary, it was expressly provided in the agreement between Yale and the plaintiff and the other creditors of Chapman, the assignor, that the settlement with Yale and the agreement to release him, should not operate as a discontinuance of the suit. If a new referee was appointed in that suit, and the case referred back to him to state the account between the creditors of Chapman and the assignees and to find and report how much has been paid, to whom, and how much money is due to creditors who have not been paid, in full, pursuant to the provisions of the assignment, creditors who have not been paid could then come in, and those who did not come in might be precluded from obtaining any share of the assets of the assigned property, and thus the rights of all parties be protected. This would seem to me to be the best way out of the embarrassments under which both parties to the suit are now laboring. But whether it is practicable, counsel, who are more familiar with the case than I can be, are much better able to determine.

If it shall turn out that, by reason of the death of two of the assignees and the loss of the books and papers, a proper accounting cannot be had, the referee, should one be appointed, will be able to ascertain the fact, and the court, on the coming in of his report, can make such order as will be just between the parties. Until an accounting is had, the question whether the plaintiff is entitled to a judgment against the defendant Hall cannot be entertained. The amount to which plaintiff is entitled out of the assets of the assigned property, if any, in the hands of the assignees, should be first ascertained; and if any thing shall then remain due, the remedy, if any, against Hall, may be resorted to.

The judgment must be reversed and a new trial granted before another referee, costs to abide event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial ordered before another referee, costs to abide event.

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JOSEPH P. SAMPSON, RESPONDENT, v. THE BUFFALO,  
NEW YORK AND PHILADELPHIA RAILWAY COM-  
PANY, APPELLANT.

*Notice of lien by laborers and material-men against railroad company — what must be shown to establish lien — Chap. 402 of 1854 and 529 of 1870.*

One Robertson entered into a contract with the defendant, a railroad company, to construct forty-seven miles of its road, and thereafter entered into a contract with one McGraw, by which the latter agreed to construct a portion thereof. Subsequently, McGraw having failed to pay his laborers and others who had furnished materials, the latter filed notices as provided by section 4 of chapter 402 of the Laws of 1854, as amended by section 1 of chapter 529 of 1870, and to foreclose these this action was brought against the company and McGraw. At the time the notices were filed nothing was due to McGraw.

*Held*, that as nothing was due to McGraw at the time the notices were filed, the company were not liable to pay the amounts therein set forth.

That, to render the company liable, it must also be shown that it was, at the time of the filing of the notices, indebted to Robertson on its contract with him.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

*Sherman S. Rogers*, for the appellant.

*Leverett Spring* and *Thomas Corbett*, for the respondent.

MULLIN, P. J.:

On the 4th of August, 1870, the Buffalo, New York and Philadelphia Railway Company, entered into a contract with one David Robertson, to furnish the materials and build and complete said company's road from South Wales to Olean, a distance of forty-seven miles, according to specifications annexed to said contract, the work to be completed prior to the 1st September, 1871, for which said company agreed to pay \$19,500 per mile, to be paid monthly, between the first and tenth of each month, after the commencement of the work, for the work done in the preceding month, less ten per cent, which the company had the right to retain until the completion of the work; but the right to retain the ten per cent terminated when the amount reserved amounted to \$25,000.

On the 30th March, 1871, Robertson entered into a sub-contract with the defendant McGraw, for the construction of a section of said road about two and a-half miles in length, the work to be finished by July 1, 1871. Within the portion of the road to be made by McGraw there was a bridge to be built across the Cattaraugus creek, with the necessary embankments. McGraw entered upon the performance of the work and employed sundry persons to aid in building the bridge. On the 11th of December, 1871, he was indebted to some of them in divers sums of money, and on the sixteenth of December of the same year, and on the 5th, 10th and 22d of January, 1872, he was indebted to divers other persons for work on said bridge and materials furnished therefor. At the dates last above mentioned the persons, so doing work and furnishing materials, filed in the office of the town clerk of the town in which the bridge was situated, the notices required by section 4 of chapter 402 of the Laws of 1854, as amended by section 1 of chapter 529 of the Laws of 1870, setting forth, that McGraw was indebted to each of them for the amount by them severally stated, for work done and materials furnished in building

said bridge. The claims were all assigned to the plaintiff and by him owned when this action was commenced. This action is brought to enforce such claims.

McGraw owed the debts for which liens were sought, and it was from the money due to him that they could require payment. The railroad company owed McGraw nothing; they had made no contract with him to build the road or furnish the materials for it or any part of it. The company's contract was with Robertson, and Robertson was liable over to McGraw. It does not appear that Robertson owed McGraw any sum whatever at the time the notices of liens were filed, nor what amount of work McGraw had done on, or what amount of materials he had furnished for, the bridge or the railway. The claimants could have no lien on either the bridge or railway unless money was due from Robertson to McGraw. That fact was not proved, and the failure to prove is fatal to the judgment.

Again, on the facts stated in the case, it appears that when the notices of liens were filed the defendant owed nothing to Robertson; on the contrary, he had been largely overpaid for what he had done under the contract up to that time. On the 1st December, 1871, the amount of the work, etc., done, was \$596,060.34; on the 1st January, 1872, \$631,925.56; on the 13th May, 1872, \$696,488.01. On and prior to the thirteenth May, he had been paid by the defendant \$971,165.27, or \$274,667.26 more than all the work done and material furnished by him came to. On the 13th May, 1872, Robertson abandoned the contract and the defendant proceeded to finish the work. Between the time of filing the notices of liens and the time Robertson abandoned the contract some \$40,000 were paid to Robertson, but in the absence of all evidence repelling the inference necessarily arising from the overpayment to Robertson by defendants the plaintiff is not entitled to benefit from the payments between the time of filing the notices and the abandonment by Robertson of the contract. The payments thus made must be deemed to be advances to Robertson and not as payments of a debt actually due. It is quite probable that there was evidence before the referee showing that the money thus paid was paid in satisfaction of a debt, but as it stands the defendants had paid more than all it was owing to Robertson before the notices were filed and, hence, the claimants acquired no lien on the bridge or railway.

It is due to the parties that the case should be again tried when their real or apparent difficulties can be removed. The receipts given to the defendant by Robertson would seem to show that the \$40,000 was paid him for work, etc., but the overpayment is established by equally conclusive, if not more conclusive, evidence that Robertson was largely overpaid. The plaintiff's counsel gave no proof in explanation of this conflict in the evidence, and it should be ascertained which of the propositions thus apparently proved is the correct one.

New trial granted before another referee, costs to abide event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial granted before another referee, costs to abide event.

MEMORANDA  
OF  
CASES NOT REPORTED IN FULL.

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IRA SEYMOUR, RESPONDENT, v. ALEXANDER MCKINSTRY,  
JR., AND OTHERS, APPELLANTS.

*Settlement of issues — discretionary with court — order directing, is not appealable.*

APPEAL from an order of a Special Term in Onondaga county settling issues to be tried by a jury, in an action brought to foreclose a vendor's lien and for other equitable relief.

The court at General Term said, "The granting of issues is not a matter of course, but is now, as formerly, discretionary with the court. In an equity case (except a suit for a divorce), a jury trial is not a matter of right. The judge may try all the issues, or he may, either upon the application of counsel, or upon his own motion, send any question upon which he prefers the judgment of a jury, to that tribunal. From an order settling issues in an action of that character, no appeal lies. (*Wood v. The Mayor, etc., of New York*, 4 Abb. [N. S.], 152; S. C., 3 id., 467.) If either party desires to question the form of the issues, he may do so by presenting a petition for a rehearing of the decree or order directing them. (*White v. Lisle*, 3 Swanst., 351; 2 Dan. Ch. Pr., 757; 1 Barb. Ch. Pr. [2d ed.], 456.) The petition should be presented to the Special Term."

*Ruger & Jenny*, for the appellants, McKinsty and Sabey.  
*Wm. W. Teall*, for the appellants, W. W. and Sarah M. Teall.  
*Eugene Forman*, for the respondent.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT, J., concurred.

Appeal dismissed, with ten dollars costs and disbursements.

## SAMUEL W. JOHNSON AND OTHERS, EXECUTORS, ETC., RESPONDENTS, v. THE CITY OF ROCHESTER, APPELLANT.

*Temporary injunction — when granted to restrain trespasses.*

APPEAL from an order of the Special Term in Monroe county denying a motion to dissolve a temporary injunction. The motion was made upon the papers upon which the injunction was granted, including the verified complaint. The complaint alleges that the plaintiffs are, and since July, 1876, have been in possession of certain lands in the city of Rochester, on which is a building known as Jones' cotton factory, claiming an interest therein and the right of possession, and carrying on the business of manufacturing cloth in said premises, and that in April last, while plaintiffs were so in possession, the defendant, a municipal corporation, by its agents and servants, and without any right or authority, and against the will of the plaintiffs, wrongfully entered upon said premises, and removed and destroyed plaintiffs' fence, gate and inclosure erected thereon; and wrongfully drove defendant's team and wagons upon and across a portion thereof, and is now using the same as a passageway upon which to carry dirt and filth, and threatens to continue to use the same for that and other purposes; that the conduct of the defendant, if continued, will lead to a multiplicity of suits, and that any remedy by actions for damages will be inadequate.

The court at General Term said: "Although the general rule is that an injunction will not be granted to restrain a mere trespass, without special equitable features in the case, it is well settled that such equitable features exist when there is vexation from repeated or continued trespass in the nature of a nuisance, or when the wrongful acts, continued or threatened to be continued, might become the foundation of adverse rights, and would occasion a multiplicity of suits to recover damages. (See *Mohawk and Hudson R. R. Co. v. Artcher* (6 Paige, 83); *Williams v. N. Y. C. R. R. Co.* (16 N. Y., 97.) The present case is within the rule above stated. It does not differ in principle from the case of *Rice v. Cannon*, decided by us at the last term, in which we affirmed an order refusing to vacate an injunction."

*J. Van Voorhis*, for appellant. *W. F. Cogswell*, for respondents.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT, J., concurred.

Order appealed from affirmed, with ten dollars costs and disbursements.

OSGOOD N. RUSSELL, RESPONDENT, v. THE CONSOLIDATED  
FRUIT JAR COMPANY, APPELLANT.

*Contract for commissions on sales—construction of.*

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought to recover commissions for selling fruit jar trimmings and other metal goods, as agent for the defendant, under a special contract.

There were two contracts between the parties. The first was dated 22d December, 1871, and, by its terms, was for "the ensuing year." The second bore date 9th January, 1873, and continued to 1st November, 1873. The rate of commissions under the first contract was fixed at two and one-half per cent on the amount of sales and collections, and under the second contract it was one and one-half per cent. The principal question in the case is whether the referee erred in allowing the plaintiff commissions at two and one-half per cent, instead of one and one-half, on certain sales and collections, amounting in the aggregate to the sum of \$28,638.15. The question depends upon the construction of a clause in the first contract, which is in the following words: "You are also to receive" (in addition to forty dollars a week previously provided for) "two and one-half per cent commission on your sales of jar trimmings, which commission is to be on sales made by us to such parties during the season of 1872." The referee found that the plaintiff procured the orders or contracts which led to the sales in question, during the year 1872, but they were not reported by him to the defendant until after the expiration of that year. They were reported, however, before the making of the second contract, on 9th January, 1873, but the defendant did not accept or act upon them, or deliver goods upon them, till after that date. The contract provided that sales



were not to be binding upon the company till they were accepted, and no commissions were to be paid upon any sale until the amount of it was collected. The company received pay on the sales in question.

The court, at General Term, said: "The counsel for the appellant contends that the contract, by express terms, confines the commissions to sales made by the defendant, upon orders procured by the plaintiff during the year 1872. That, it is claimed, is the obvious meaning of the words, 'which commission is to be on sales made by us to such parties during the season of 1872.' In other words, the claim is that the commissions were not earned till the sales had become binding, by the defendant's acceptance of the plaintiff's orders. We think, however, the words last above quoted were intended not to limit the commissions, but to extend them so as to include not only the orders of parties obtained by the plaintiff in 1872, which were subsequently accepted, filled and collected, but also additional sales made to 'such parties,' by the defendant, during that year. The plaintiff, having procured the customer, was to be entitled to commissions not only on his first order, but also on all subsequent sales made to such customer, by the defendant, during the year. Upon that construction, the conclusion of the referee is correct."

*F. A. Macomber*, for the appellant. *F. L. Durand*, for the respondent.

Opinion by SMITH, J. ; MULLIN, P. J., and TALCOTT, J., concurred.

Judgment affirmed.

# Cases

DETERMINED IN THE

## SECOND DEPARTMENT

AT

GENERAL TERM,

February, 1878.

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LUCIUS N. MANLEY, AS RECEIVER, ETC., OF AUGUST RASSIGA, RESPONDENT, *v.* MARY R. A. RASSIGA, MICHAEL H. CULLINAN AND AUGUST RASSIGA, APPELLANTS.

*Receiver—appointment of, by officer of special jurisdiction—what allegation as to appointment sufficient.*

In an action brought by a receiver appointed in supplementary proceedings, the complaint alleged that, "by an order of determination, then *duly* made by Hon. John J. Armstrong, county judge for the county of Queens, the plaintiff was appointed receiver,"

*Held*, that his appointment was sufficiently alleged, and that a demurrer, on the ground that the complaint did not show that he had legal capacity to sue, was properly overruled.

APPEAL from an order made at the Special Term overruling a demurrer to the complaint. The action was brought by the plaintiff, as receiver of August Rassiga, to set aside certain transfers made by him, on the ground that they were fraudulent as against his creditors. The complaint alleged, in regard to the plaintiff's appointment: That on the 31st day of May, 1877, at Jamaica, Queens county, New York, upon an application made by John Kane, a judgment creditor of said August Rassiga, in proceedings supplementary to execution and by an order of determination, then

duly made by Hon. John J. Armstrong, county judge for the county of Queens, the plaintiff was appointed receiver of the property of said August Rassiga; and upon the filing and approval of his bond, as hereinafter mentioned, became and still is such receiver and authorized to bring this action.

The defendant demurred, on the ground that the complaint did not show that the plaintiff had legal capacity to sue, and that it did not state facts sufficient to constitute a cause of action.

*George F. Langbein*, for the appellants. There is no sufficient allegation in the amended complaint showing the receiver's authority to sue or bring the action, or that he was regularly or duly appointed. The rule is stringent as to creditors' actions by receivers. (*Coops v. Bowles*, 18 Abb. Pr. Rep., 443; S. C., 42 Barb., 87.) The receiver's appointment and his authority to sue must be duly alleged. (*Gillet v. Fairchild*, 4 Denio, 80; *White v. Joy*, 7 Barb., 204; *Bangs v. McIntosh*, 23 id., 204; *Bolles v. Duff*, 43 N. Y., 469; *Story v. Forman*, 25 id., 214; *Albany Ins. Co. v. Van Vranken*, 42 How., 281; *Stewart v. Beebe*, 28 Barb., 34; *Dayton v. Connah*, 18 How., 326; *Cheney v. Fisk*, 22 id., 236; *Rockwell v. Merwin*, 45 N. Y., 178.) There is no allegation in the amended complaint that the plaintiff, as receiver, has filed and recorded his alleged order of appointment, nor is there any allegation of facts, or otherwise, showing that the plaintiff has done and performed any of the acts and requisites required by section 298 of the Code of Procedure, in order to vest the title of the real estate or property in him so as to permit him to bring this action. The filing and recording of the order is a condition precedent to the vesting of title in the receiver, and it therefore follows that an allegation of the fact of such filing and recording in the complaint is essentially necessary to show title in the receiver. (*Gillet v. Fairchild*, 4 Denio, 80; *Hedges v. Bungay*, 16 Abb. Pr. [N. S.], 313; *Juliaud v. Rathbone*, 39 N. Y., 369; *Rogers v. Corning*, 44 Barb., 229; *Becker v. Torrance*, 31 N. Y., 631; *Clark v. Brockway*, 42 id. [3 Keyes], 15; Riddle's Supplementary Proceedings, 142, and cases cited; Hoffman's Provisional Remedies, 526.) The complaint does not show that a transcript of the judgment was filed and docketed in Queens county. The lien of a judgment does not attach until docketing; and as the lien is

entirely regulated by statute, equity cannot extend it. (*Buchan v. Sumner*, 2 Barb. Ch., 165; *Fort v. Dillaye*, 65 id., 521, Gen. T., 1873).

*Wm. C. Reddy*, for the respondent.

BARNARD, P. J.:

The allegation of the appointment of the plaintiff as receiver is sufficient. Such appointment is averred to have been made on the 31st May, 1877, in proceedings supplementary to execution, by Hon. J. J. ARMSTRONG, county judge of Queens county, "by an order of determination then duly made." By section 161 of the old Code, and which has been preserved untouched in the new Code (section 532), it is provided that in pleading a determination of a court or officer of special jurisdiction, it shall not be necessary to state the facts conferring jurisdiction, but the determination may be stated to have been duly made. This averment in this case, carries with it the filing of the order. Without all the steps are taken to make a valid determination, it is not duly made. The rights of the plaintiff, as receiver, are finally settled by the Court of Appeals, in *Bostwick v. Menck* (40 N. Y., 383). He became vested with the legal title to all the personal property of the debtor. "Such appointment conferred upon him the further right to prosecute such actions, to set aside all transfers of property made by the debtor, to defraud his creditors, as the creditors themselves could have maintained." The complaint avers his appointment to have been duly made, and this action is brought to set aside a transfer made in fraud of creditors. The judgment creditor could have maintained this action before the appointment of the receiver, after the issuing and return of an execution unsatisfied, as against the property of the debtor.

The order overruling the demurrer, should be affirmed with costs, with leave to defendant to answer in twenty days, on payment of costs.

GILBERT, J., concurred; DYKMAN, J., not sitting.

Order overruling demurrer to amended complaint affirmed, with costs and disbursements, with leave to defendant to answer in twenty days, on payment of costs.

CHARLES ROBINSON, APPELLANT, v. JOHN H. COMER,  
RESPONDENT.

*Bill of particulars—when ordered in action for conversion.*

The complaint in this action alleged that in or about the years 1876 and 1877, this plaintiff was the lawful owner of, and entitled to, the quiet and peaceable possession of certain goods, chattels and personal property, of the value of \$5,000, and that the same were wrongfully taken and carried away by the defendant herein and converted to his own use.

*Held*, that the action was a proper one in which to order a bill of particulars.

APPEAL from an order made at the Special Term, directing that a bill of particulars of the goods, chattels and personal property referred to in the complaint in this action, be furnished to the defendant.

The action was brought to recover damages for the conversion of personal property belonging to the plaintiff. The complaint alleged, among other things, that heretofore, to wit, in or about the years 1876 and 1877, this plaintiff was the lawful owner of, and entitled to, the quiet and peaceable possession of certain goods, chattels and personal property, of the value of \$5,000, then being at the town of Goshen, in said county of Orange.

That subsequently, and in or about the years 1876 and 1877, the said goods, chattels and personal property so owned by, and belonging to this plaintiff as aforesaid, were, at the said town of Goshen, in said county of Orange, wrongfully and unlawfully taken and carried away by the defendant herein, and wrongfully and unlawfully converted to his own use by him, to this plaintiff's damage, \$5,000.

*Bacon & Duryea*, for the appellant.

*Winfield, Leeds & Morse*, for the respondent.

BAERNARD, P. J. :

The papers in this case disclose a clear case where it is proper to order a bill of particulars. The complaint alleges a wrongful taking and conversion of property belonging to plaintiff. There is no

designation of what the property is, or where the taking is made, except in an averment of the most general character, as follows :

"In or about the years 1876 and 1877, this plaintiff was the lawful owner, and entitled to the quiet possession, of certain goods, chattels and personal property, of the value of five thousand dollars," that, "subsequently and in or about the years 1876 and 1877 the said goods, chattels and personal property," were wrongfully converted by defendant, to his own use. It is manifest that this language fails to indicate any particular claim which a defendant can meet. But two reasons are suggested, why the bill of particulars should not be granted. The defendant asks in his affidavit, a bill of particulars to enable him to answer other actions subsequently commenced. The plaintiff insists that the defendant can answer the other actions without this bill of particulars. The items of the other actions are stated particularly. If the defendant has given a wrong reason for asking the bill of particulars, that should not prejudice his right. If, as defendant claims, the large indefinite claim in the first action, in fact, includes the same items as are included in each of the three subsequent actions, the defendant should have a bill of particulars, to enable him to answer this action.

The second reason urged why a bill of particulars should not be granted is, that defendant already knew what the claim is ; he knows what he has converted to his own use. If this were so, it would be an unanswerable reason, but the defendant denies it. Until the trial, it cannot be known by a court, whether the defendant has converted the property or not.

As the pleadings stand, and before a trial, it cannot be said that a person charged with a trespass is guilty, and that a general claim for conversion of a large amount of property cannot be the subject of a bill of particulars, because of the defendant's knowledge of what property he converted, and, therefore, of what the specific claim is.

The order should be affirmed, with costs and disbursements.

DYKMAN, J., concurred ; GILBERT, J., not sitting.

Order affirmed, with costs and disbursements.

JASPER A. HICKS, APPELLANT, v. JAMES S. CHAFFEE AND  
OTHERS, AS COMMISSIONERS OF HIGHWAYS, ETC., RESPONDENTS.

*Commissioners of highways — duties of, as to bridges — negligence.*

The defendants, commissioners of highways, were notified, in June, 1875, that a bridge was defective, no particular defect being pointed out. Within a week, they, in company with an experienced bridge builder examined the bridge carefully, from above and below, taking off the planks and testing the timber, but could discover no defect. Shortly after, they caused another experienced bridge builder to examine it, and replace old planks by new, where necessary. In the following month, the bridge fell and injured the plaintiff. The accident was caused by one of the timbers being rotten at the center, which defect could only be discovered by cutting the timber in two.

*Held*, that the defendants were guilty of no negligence, and that the plaintiff was not entitled to recover.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

*A. Wager*, for the appellant.

*G. & H. D. Hufcut*, for the respondents.

BARNARD, P. J. :

It is now settled in this State that commissioners of highways are liable to a private action for injuries caused by their neglect to keep the bridges of their town in repair. (*Robinson v. Chamberlain*, 34 N. Y., 389; *Hover v. Barkhoof*, 44 N. Y., 113.)

The plaintiff's horse was injured in passing over a bridge in the town of Amenia, in Dutchess county, and the defendants were the commissioners of highways at the time of the accident. To establish a liability upon the part of the defendants they must have neglected to repair the defective bridge, in question, after notice of its condition, with reasonable and ordinary care and diligence. They must have in their hands funds with which to make the repair, or they must have the power lawfully to raise such funds, if the defect continue sufficiently long. Ignorance of the defect is of itself negligence. The question presented by this appeal is, whether the defendants are proven guilty of negligence. In June, 1875, the

defendants' were informed of the unsafe condition of the bridge. No particular defect was pointed out. Within a week after, the commissioners made a personal examination of the bridge. The commissioners employed an experienced bridge builder to examine the bridge with them. They took off the plank from the bridge so as to try the strength of the timber. They examined every thing, from above and below, carefully. They took a crow-bar and tried every exposed spot, and were unable to discover any symptom of decay in the timber. Very soon after this examination they employed another experienced bridge builder, to repair the bridge. He took off the plank and examined the bridge, replaced such new plank as was needed; within the following month the accident took place. An examination of the ruins, subsequent to the accident, disclosed the fact that one of the timbers was rotten at the center; that the defect could not be seen and could be discovered in no way but by sawing through the defective timber; that this timber had broken and caused the accident. No notice of any particular defect had been given to the commissioners.

I think the referee's finding that there was no negligence proven upon the part of the defendants' is fully sustained by the evidence. There is no absolute undertaking or guaranty upon the part of the defendants that the bridge should, at all times, and under all circumstances, be in proper condition. A reasonable degree of watchfulness in ascertaining its condition from time to time, and preventing its dilapidation, is all that is required by law of them. (*Barton v. City of Syracuse*, 36 N. Y., 57; *McCarty v. City of Syracuse* 46 id., 194; *Hover v. Barkhoof*, 44 id., 113.)

A close examination by one of the commissioners and two bridge builders failed to disclose the defect and did disclose an apparently strong timber. To hold that the defendants, under such circumstances, are liable for a defect which no examination, short of a destruction of the bridge itself would show, is to make the defendants insurers of all structures.

Judgment should be affirmed with costs.

GILBERT and DYKMAN, JJ., concurred.

Judgment affirmed with costs.



TAMSON J. AMBLER, RESPONDENT, v. GEORGE A. COX,  
APPELLANT.

*Boundary line — when it can be established by parol.*

Where a boundary line is uncertain, indefinite and disputed, the owners of the adjoining lots may agree upon and establish, by parol, a line, which neither can afterwards dispute.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury. A motion for a new trial was made on the minutes and was denied.

*Wm. H. Dickinson*, for the appellant.

*Q. McAdam*, for the respondent.

BARNARD, P. J. :

The plaintiff and defendant are adjoining owners of land. The plaintiff's lands lie on the north and the defendant's on the south side of the division line. Both pieces touch the Hudson river, and the question is as to the true location of the boundary line from the Hudson river west to Piermont road. The case seems to have been tried on both sides on the assumption that the boundary line in question was a disputed, indefinite and uncertain line. The plaintiff's husband, who appears to have acted for plaintiff, and the defendant each testified that it was a disputed, indefinite and uncertain line, and the defendant gave evidence tending to show that the only way to settle the line was by agreement. He says: "I saw we would have to agree upon the line, as the line between us was quite indefinite." Evidence was given tending to show the establishment of a line between the Hudson river and the Piermont road by mutual agreement; that the defendant built a fence in accordance with such agreement — a strong, stone fence. Some months after so building the fence the defendant built another fence to the north of this fence, and the ground covered by this last fence is the subject of the dispute in this action. The defendant denied the agreement to establish the line, saying that the plaintiff refused to agree to it. Evidence on each side was given, tending to show that the true line would go beyond the line of the alleged agree-

ment. Under this state of the proof the court charged the jury to pass upon the question of the agreement to establish the line. If they found the agreement, and that the defendant built his fence upon it, that plaintiff was entitled to recover, if the new fence was north of the agreed line. The defendant excepted to the charge because the court submitted the parol agreement to the jury, and the fact of building the fence on the line so fixed by parol. The defendant requested the court to charge the jury that if the true line was north of the new wall, the defendant was entitled to recover. This was refused. The only questions presented are as to these exceptions. I suppose the law to be well settled that an uncertain, indefinite and disputed line may be agreed upon and established by parol. (*Vosburgh v. Teator*, 32 N. Y., 561, and cases cited in the opinion of Judge POTTER.) If the parties could agree in this case the agreement became valid, and the parties could not afterward deny it.

There was no request by the defendant that the court submit the question whether there was a disputed, uncertain and indefinite line to the jury. Such a request would have been proper. The defendant seems to have based his exception solely upon the proposition that a parol agreement can settle no line. I suppose the law to be otherwise. The judgment should be affirmed, with costs.

GILBERT, J., concurred; DYKMAN, J., not sitting.

Judgment and order denying new trial affirmed, with costs.

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ROSE RYDER, APPELLANT, v. HUGH M. THOMAS,  
RESPONDENT.

*Owner of real estate — liability of, for acts of contractor in doing work upon it.*

The defendant made a contract with one Clynes by which the latter agreed to raise a house, belonging to the former, four feet. The contractor dug a trench in the sidewalk next to the house about two feet wide and of about the same depth and threw the earth upon the sidewalk. The excavation was left unguarded and the plaintiff fell into it and was injured. The defendant did not authorize the trench to be dug, nor did he know of its having been made until after the accident. Its digging was not necessary to the performance of the contract. *Held*, that the defendant was not liable.

The owner of real estate is not liable for acts of a contractor employed to do work upon it unless (1), the contractor is his employe, or (2), unless the work, as authorized by the contract, necessarily produced the injury, or (3), unless the injuries were occasioned by the omission of some duty imposed upon him.

APPEAL from a judgment in favor of the defendant, entered upon the report of a referee.

The action was brought to recover damages sustained by the plaintiff, from falling into a trench in the sidewalk in front of a building belonging to the defendant.

*Edward Nicoll*, for the appellant.

*A. T. Payne*, for the respondent.

BARNARD, P. J.:

The rule that an owner of real estate is subjected to liability for any injury, resulting from negligence, done in the performance of work for the benefit of the land, is not now recognized. (*King v. N. Y. Central Railroad*, 66 N. Y., 181.) By the same case it is established, that if the person who was the immediate cause of the injury was a contractor, engaged in performing a contract to do a specific work, the relation of master and servant is not created by the contract between the parties, and that the other party is not liable for the contractor's negligence. Applying these principles to the evidence in this case, the disposition of it by the referee seems to have been right. The defendant made a contract with one Clynes to raise a building belonging to defendant in Long Island City. It was not necessary to interfere with the sidewalk or street to perform the contract. The building was to be raised four feet from a point about one foot above the level of the sidewalk. The contractor dug a trench in the sidewalk next to the house about two feet in width and about of the same depth, and threw the earth excavated upon the sidewalk. The excavation was left unguarded at night and the plaintiff fell into it and was injured. Defendant did not dig or authorize the digging of the ditch and did not know of its being done, until the next morning after the injury. The excavation was made in the afternoon or evening of the day when the injury happened. Defendant is not chargeable

for the neglect of the contractor in doing work upon his lands, unless he is first, either the employer, or second, unless the work as authorized by the contract necessarily produced the injury, or third, unless the injuries were occasioned by the omission of some duty imposed upon him. (*McCafferty v. Spuyten Duyvil and P. M. R. R. Co.*, 61 N. Y., 178.) Defendant is not the master, as we have seen. The work did not necessarily occasion the injury. It did not require it to be done. The contract did not require it to be done in the way the contractor did it. It was an act purely collateral to the work called for by the contract. Lastly, the defendant omitted no duty. The act was done without his knowledge or assent and by some one unknown to him. If the defendant had known of the creation of a nuisance in the street he would have been chargeable under the cases for not abating it at once or guarding it. The case lacks this element of liability.

The judgment should be affirmed, with costs.

GILBERT and DYKMAN, JJ., concurred.

Judgment affirmed, with costs.

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WILLIAM R. CASTLE, RESPONDENT, v. HENRY LEWIS AND  
OTHERS, APPELLANTS.

*Corporation — power of, to transfer property while it has but two trustees.*

Where a corporation, created under the act of 1848, has borrowed and received money, upon an agreement to secure the same by a pledge of its goods, fails to give such pledge, but subsequently, and while it has but two trustees, transfers to the lender property owned by it, in payment thereof, a good title to the property so transferred is thereby acquired by him.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court, without a jury.

*Chas. W. Seymour*, for the appellant, Lewis. A corporation can act only in the mode prescribed by the law of its creation. (*F. L. and T. Co. v. Carrol*, 5 Barb., 613.) That law has said that the

property and affairs of the corporation shall be managed by trustees, and by not less than three. (Act of February 17, 1848; act of 1860, chap. 269, § 1, etc.) If the affairs and property of a corporation can be managed otherwise than the law provides, by less than three trustees, it can be done when there are none — by stockholders, the only members of the corporation left; and yet, no doctrine is better settled than that a stockholder has no power to do an act, authority to perform which is given to a board of directors. (*McCullough v. Mass*, 5 Den., 567; *Conro v. Port Henry Iron Co.*, 12 Barb., 27; *The Mut. Fire Ins. Co. v. Keyser*, 32 N. H., 313; *Gashviler v. Willis*, 33 Cal., 11; *Angell & Ames on Corp.* [10th ed.], § 771. *Phelps v. Wickham*, 1 Paige, 590.)

*Henry Parsons*, for the respondent.

BARNARD, P. J. :

The Manhattan Glove Company, a corporation organized under the Laws of this State, for manufacturing purposes. Being in need of money to carry on its business, it procured a loan of \$5,000, of a Mr. Armstrong, under a promise to secure its repayment, by a pledge of their goods. This was found difficult, and before it was accomplished, one of the trustees resigned, leaving but two to conduct the business. These two trustees concluded to leave certain of their goods with Beiber & Co., for sale on commission. Before they were all sold, this Armstrong demanded the repayment of the loan. This the corporation was unable to do in cash, but made an assignment of the goods unsold in Beiber & Co.'s hands, and also of the moneys the proceeds of goods before that sold. The defendant forcibly took and carried away the goods from Beiber & Co., after the transfer. The plaintiff has become entitled to Mr. Armstrong's rights in the goods and money. The transfer was good as between the corporation and Mr. Armstrong; neither party could aver want of authority. The corporation which received the money and gave a title to property, while having only two trustees, could not set up that fact as against the claim of Mr. Armstrong, to the property conveyed. (*Eaton v. Aspinwall*, 19 N. Y., 119; *Bissell v. Michigan Southern R. R.*, 22 id., 258; *Parish v. Wheeler*, 22 id., 494.)

The defendants are strangers to the transaction. They are not

judgment creditors. They aver no interest in the property in this answer. They rely simply upon the absolute failure of title in the plaintiffs, by reason that the transfer was made when the corporation had only two trustees. If a private creditor of the corporation could litigate that question, the defendants are not in such a position. There was sufficient proof of the taking of the goods by defendant, to sustain the finding at Circuit. The goods were taken by the sheriff of the city of New York, upon process issued in the name of defendants. When plaintiff attempted to establish his title by the aid of a sheriff's jury, the attorney for defendants procured an adjournment, under a promise that they would give a bond of indemnity. The sheriff subsequently sold the goods and paid part of the proceeds to defendants' attorney. The slightest interference with the property of another, or the least exercise of dominion over it, will amount to a conversion. The acts proven and fairly deducible from the evidence, leave no doubt but that the seizure was by direction of defendants.

The judgment should be affirmed, with costs.

GILBERT, J., concurred.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment affirmed, with costs.

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ELIAS H. McLEAN, RESPONDENT, v. JAMES O. COLE,  
APPELLANT.

*Question arising upon trial — can only be reviewed upon a case settled — Form of judgment in replevin.*

No question, either of fact or of law, arising upon a trial — *e. g.*, an objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery — can be reviewed upon appeal, except upon a case made and settled according to the established practice.

MOTION to dismiss an appeal taken from a judgment in favor of the plaintiff, entered upon the verdict of a jury.

*Eugene B. Travis*, for the appellant.

*Elbert P. James*, for the respondent.

BARNARD, P. J. :

This action was tried at the Putnam court by a jury. The complaint was in the usual form for the recovery of the possession of personal property, or for its value, if a return could not be had. The appeal is taken without a case having been settled according to the practice of the court. The appellant has printed and served a copy of the judgment roll simply. By this it appears that the verdict of the jury was a money verdict only, for \$756. The ground of the appeal is, that the verdict should have been for a return of the property or for the value in case of its nondelivery. The appellant claims the right to review this alleged error, as it appears on the judgment roll without a case. This cannot be done; no question, either of fact or law, arising upon the trial can be reviewed except upon a case made and settled according to established practice. (*Conolly v. Conolly*, 16 How., 227; *Hunt v. Bloomer*, 13 N. Y., 341; *Johnson v. Whitlock*, 13 id., 345; *Smith v. Grant*, 15 id., 590.)

The appeal must be dismissed with ten dollars costs.

Present — BARNARD, P. J., and GILBERT J; DYKMAN, J., not sitting.

Motion to dismiss appeal granted, with ten dollars costs.

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DANIEL C. REYNOLDS, RESPONDENT, v. EDMUND GUILBERT, APPELLANT.

*Contract — consideration of — what sufficient to support it.*

Plaintiff and defendant being the owners respectively of two pieces of property each adjoining another lot, and fearing that the latter would be so used as to injure their property, entered into an agreement by which the plaintiff agreed to buy the lot for \$2,500, and the defendant agreed to pay him \$100 for so doing. Plaintiff having purchased the lot, brought this action to recover the \$100. *Held*, that there was a good consideration to support the contract, and that it could be enforced.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury. A motion for a new trial was made on the minutes and was denied.

*Wm. F. Purdy*, for the appellant.

*L. T. Yale*, for the respondent.

BARNARD, P. J. :

The defendant requested the plaintiff to buy a lot adjacent to both parties, and which each feared would be purchased by some one who would use it so as to injure the property of each of the parties. He promised the plaintiff that if he would buy the land at \$2,500, he would pay him, the plaintiff, \$100. The plaintiff bought the lot at the price. The case was tried at the Circuit upon the issue whether a promise had been made by defendant to plaintiff. No question was made as to the liability of defendant in case there was a promise. The jury found for the plaintiff. The defendant now upon appeal first urges the objection that there was no legal consideration for the promise.

I think the case is not distinguishable in principle from *Van Rensselaer v. Aikin* (4 Barb., 547). In that case, several persons adjacent to a highway, agreed to pay to one of their number certain sums designated by them for the repair of the highway. The promise was held to be good upon two grounds: First, there was a sufficient consideration in the benefit to be derived from the work; and, second, it was a conditional promise, and the acceptance of the offer and performance of the condition established the liability; the gratuitous promise to pay upon condition became binding upon performance of the condition. The plaintiff has acted upon the faith of the promise, and has expended his money as he agreed to do, and the defendant's liability is fixed. (*Wayne and Ontario Collegiate Institute v. Smith*, 36 Barb., 584.)

Judgment should be affirmed, with costs

GILBERT, J., concurred, DYKMAN, J., not sitting.

Judgment and order denying new trial affirmed, with costs.



ANDREW J. PROVOST, RESPONDENT, v. JAMES FARRELL,  
APPELLANT.*Costs — taxation of.*

In an action of ejectment the plaintiff recovered upon the trial before a referee; a new trial was ordered by the General Term, costs to abide the event. On the second trial defendant obtained a verdict in his favor; a new trial was granted on the ground of newly-discovered evidence, on payment of \$150, costs and disbursements of the action, and ten dollars costs of the motion, after payment of which, a third trial was had and a verdict rendered in favor of plaintiff.

*Held*, that plaintiff was not entitled to tax costs for either the first or second trials, but only for the third.

Fees paid to a stenographer and for preparation of maps cannot be taxed.

APPEAL from an order readjusting the costs of plaintiff, made on an appeal to the Special Term from the taxation by the clerk of Kings county.

The costs accrued in an action of ejectment and the following proceedings have been had therein :

On the first trial before a referee judgment was rendered for the plaintiff, an appeal was taken by the defendant to the General Term. The judgment was there reversed on the facts and the law, and a new trial ordered at Circuit, "costs to abide the event."

On the second trial a verdict was given for defendant. A motion was made by plaintiff for a new trial on the minutes and on the ground of newly-discovered evidence; which motion was granted by Mr. Justice GILBERT upon payment by plaintiff "of \$150.61, costs and disbursements of this action, and ten dollars costs of this motion."

On the third trial a verdict was given for plaintiff for the recovery of the land, without damages. A motion for a new trial was made on the minutes by the defendant, and denied by Mr. Justice PRATT, without costs.

The following was the bill of costs presented by the plaintiff :

SECOND DEPARTMENT, FEBRUARY TERM, 1878.

1. To costs taxed on first trial and entered in judgment, \$251 39	
2. To costs on appeal . . . . .	
3. Two terms, General Term cal. . . . .	20 00
4. Before argument . . . . .	20 00
5. For argument . . . . .	40 00
6. To printing points . . . . .	17 50
SECOND TRIAL.	
7. Trial of issue of fact. . . . .	30 00
8. Trial more than two days . . . . .	10 00
9. Term fees October and May. . . . .	20 00
10. Jury and trial fee. . . . .	4 00
11. Witnesses' fees, J. V. Meserole, seven days and mileage, . . . . .	6 86
12. Nicholas Boch, seven days and mileage. . . . .	6 86
13. Register fees. . . . .	1 25
14. Jos. B. Colyer, seven days and mileage. . . . .	6 88
15. Stenographer's fees. . . . .	25 00
THIRD TRIAL.	
16. Proceedings before and after granting new trial . . . . .	25 00
17. Trial issue of fact. . . . .	30 00
18. More than two days. . . . .	10 00
19. Register's fees, maps. . . . .	1 25
20. Jury and trial fees . . . . .	4 00
21. Witnesses . . . . .	
22. General Meserole, six miles, seven days . . . . .	6 86
23. Bartlett, six miles, seven days. . . . .	6 86
24. Opinion General Term . . . . .	1 25
25. Affidavits, etc . . . . .	1 00
26. Satisfaction-piece . . . . .	25
27. Transcripts and filing. . . . .	37
28. Certified copy judgment . . . . .	1 50
29. Postage . . . . .	60
30. Stenographer's fees . . . . .	25 00
31. Sheriff's fees on execution. . . . .	1 38
32. Maps, copies and drawings, etc. . . . .	75 00
33. Clerk on entering judgment and tax. . . . .	1 25
34. Costs of motion for new trial . . . . .	10 00
\$661 31	

## SECOND DEPARTMENT, FEBRUARY TERM, 1878.

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The bill of costs, as presented, was.....	\$661 31
The clerk struck out item 32 (maps, etc.) .....	75 00

Costs as taxed .....	\$586 31
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Disallowed by Judge DYKMAN :

Item 15 (stenographer's fees).....	\$25 00
Item 30 (stenographer's fees).....	25 00
Item 34 (costs of motion).....	10 00
Also \$150 paid defendant.....	150 00
	<hr/> 210 00

Leaving as costs.....	\$376 31
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The appellant claims that there should be deducted from the bill of costs of..... \$661 31 the following items:

Item 1, costs of first trial. ....	\$251 39
Items 7 to 15, costs of second trial.....	85 85
Item 15, stenographer's fees.....	25 00
Item 30, stenographer's fees.....	25 00
Item 32, maps, copies, etc .....	75 00
Item 34, costs of motion.....	10 00
Items 2 to 6, costs of appeal .....	97 50
	<hr/> 569 74

Leaving judgment for plaintiff of.....	\$91 57
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*W. R. Lynch*, for the appellant.

*A. J. Provost*, respondent in person.

GILBERT, J. :

The plaintiff's application for a new trial was not made under the provision of the Revised Statutes on that subject (2 R. S., 309, § 37), but was addressed to the discretion of the court. Hence the court had power to grant it upon terms less severe than the statute cited prescribes. The court exercised that power, and granted the motion upon payment of part only of the defendant's costs of the action, viz., \$150.61. That, in legal effect, determined the right to all the costs of the action which had accrued prior to the entry of the order granting a new trial, except the costs of the appeal, in

favor of the defendant, limiting the amount thereof, however, to the sum named. After such an order neither party would be entitled to claim costs which had been so adjusted and ordered paid. The costs of the first trial, and of the second trial must, therefore, be disallowed. The items for stenographer's fees, and maps are not taxable.

The result is, that the plaintiff is entitled to tax only the costs and disbursements of the appeal, and other costs which have been incurred since the entry of the order of July 7, 1877.

Ordered accordingly.

Present — BARNARD, P. J., and GILBERT, J.; DYKMAN, J., not sitting.

Order reversed, and readjustment ordered in accordance with opinion.

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ISAAC HALL AND OTHERS, APPELLANTS, v. ELLEN HALL AND OTHERS, RESPONDENTS.

*Devise to alien — filing of deposition, under chapter 115 of 1845 — effect of.*

An action for partition may be brought, under the act of 1853, relating to disputed wills, when the property sought to be partitioned was devised, in the will of the testator, to a devisee who was incompetent to take by devise because of alienage.

A testator devised certain real estate to his sister and her husband, for their joint lives and the life of the survivor, with remainder to the children of the sister. All these children were aliens at the time of the testator's death, and had not filed the deposition required by the laws of this State, to enable them to hold such real estate, but one of them filed the deposition as required by the act of 1845 (chap. 115), and all were naturalized prior to the death of their mother.

*Held*, that upon the death of the testator, this sister and her husband took an estate for life in the property.

That the devisees of the estate in remainder, being incompetent to take, such estate vested in the citizen heirs of the testator, subject to be defeated by the filing by the devisees of the deposition provided for in section 1 of chapter 115 of 1845.

That, upon the filing of such deposition by the said devisees, the estate of the heirs would divest, and the same would vest in the devisees named in the will. Section 11 of the said act excepts from its operation only those interests which had become vested prior to its passage.

That the omission of two of the devisees to file the deposition was cured by chapter 88 of the Laws of 1875, conferring upon heirs and devisees, being of the blood of the devisor, whether citizens or aliens, capacity to take and hold the real estate owned and held by the devisor at the time of his decease — except as against the State only; the act of 1875 being retroactive in its operation.

The practice of directing a *pro-forma* verdict at Circuit, and reserving the cause for further argument and consideration to be had on a motion made on the judge's minutes to set aside the verdict, and on the hearing of such motion directing judgment in favor of the party entitled thereto approved.

APPEAL from an order made at the Special Term, setting aside the verdict of a jury, and directing the dismissal of the complaint herein.

The action was brought under the act of 1853, in relation to disputed wills, the plaintiffs claiming the partition of lands devised to and in possession of the above named respondents. The pleadings presented, in form, various issues of fact. The case was tried at the Circuit. At the close of the evidence, the court directed the jury to find a verdict for the plaintiffs, and ordered the cause to be reserved for further argument and consideration, on a motion on the judge's minutes to set aside the verdict. Such motion was heard accordingly, and the court ordered the verdict to be set aside, and also ordered judgment to be entered for the defendants, with costs. Judgment having been entered accordingly, the plaintiffs appealed.

William Hall, at the time of his death, on the 26th day of July, 1861, was seized in fee and possessed of the premises described in the complaint, together with other lands. His will, dated the 19th day of March, 1859, and duly executed, was admitted to probate on the 23d day of September, 1861. The following is an extract from his will: "I give, devise and bequeath unto the children of my said sister Sarissa all that portion of the farm owned and occupied by me in Newtown, Queens county, subject, however, to a life estate therein, which life estate I do hereby devise and bequeath to my said sister Sarissa, and to her said husband, Thomas Spalding, for and during their lives and the life of the survivor."

The testator died seized of the premises in question on the 26th day of July, 1861, leaving no wife and children, and leaving as his only heirs at law and next of kin, his brother, Isaac Hall, his sister, Sarissa Spalding, and the children of Thomas Hall, a deceased brother. The children of Thomas Hall, at the time of the death of

the testator, were the plaintiffs Isaac Hall and Susannah A. Schenck, the defendants Ellen Hall, Thomas Hall and — Daniel Hall, who died after the death of the testator, leaving no widow or children.

Sarissa Spalding died December 19, 1874. Her children, at the testator's death, were Jeremiah B., Susannah E., Ann Sarissa and Thomas Isaac. These children of Sarissa Spalding were residents of the State of New York at the time of the death of William Hall and have resided in the State ever since 1857, except that Thomas Isaac died after the testator's death, leaving no widow or children.

Isaac Hall, a brother of the testator, died in 1864, after the death of the testator, leaving a widow, but no children.

At the death of the testator, July 26, 1861, the plaintiffs and the defendants Ellen Hall and Thomas Hall, children of Thomas Hall, the brother of the testator, were competent to hold real estate. Isaac Hall, the brother of the testator, was naturalized October 23, 1840. Ann Hall, wife of said Isaac, filed her deposition May 30, 1856, and was naturalized October 21, 1861.

All of the above mentioned persons were competent to hold real estate when the testator died, having either filed the deposition required by the laws of this State, in the office of the Secretary of State, or having been naturalized before the testator died.

Thomas Spalding, and Sarissa, his wife, to whom the testator gave a life estate in the premises in question, were competent to hold real estate at the testator's death.

The defendants Jeremiah B. Spalding, Susannah E. Spalding, and Ann Sarissa Lewin were not competent to take and hold real estate at the death of the testator.

Jeremiah never filed any deposition, and was not naturalized until March 3, 1870. Susannah did not file any deposition until after the testator's death, to wit, October 23, 1861, and was naturalized December 19, 1863. Ann Sarissa was naturalized November 25, 1862, and she filed no deposition before the testator's death, nor at any time afterwards. Thomas Isaac died after the testator's death, and never filed any deposition, nor became naturalized. The plaintiffs Isaac Hall and Susannah A. Schenck, and the defendants Ellen Hall and Thomas Hall, children of Thomas Hall, were heirs of their brother, Daniel Hall, who died after the testator's death, leaving no widow or children.

*Sidney S. Harris*, for the appellants.

*T. James Glover*, for the respondents.

GILBERT, J. :

The practice adopted by the judge at Circuit of directing the jury *pro forma* to find a general verdict for the plaintiff, then reserving the case for further consideration, and afterwards directing a general verdict for the party entitled to it, is a very useful one when only questions of law are involved, and it was expressly sanctioned by the Code of Procedure. (§ 264.) It was also conformable to the practice before the legislature had interposed its power to regulate it by codification. It was approved by this court at General Term, and by the Court of Appeals in the case of *Maria L. Strong v. The City of Brooklyn* (not reported). The Code of Civil Procedure (§ 1189) contains a provision similar to section 264 of the former Code, but some confusion on this subject has been introduced by sections 1185 and 1234 of the Code of Civil Procedure. As the judgment in this case was entered before the latter Code went into operation, it is not necessary to determine the legal effect of those sections.

If a devise to a devisee, who is incompetent to take, be void, then this action is within the words of the act relative to disputed wills. (4 Edm. Stat., 504, § 2.) That such a devise is void, that is of no force or effect, and not voidable only, is clear. The objection of the defendants on this point, therefore, was properly overruled.

Nor can we assent to the proposition that Susannah E. Spalding would take all the estate devised to her and her co-tenants in case of the incompetency of the latter to take. It is not necessary to dwell on that proposition, because we think that the devisees have established a valid title as tenants in common of the estate in controversy.

The testator is the common ancestor. By his will he devised the lands in controversy to his sister Sarissa Spalding and her husband Thomas Spalding for and during their lives and the life of the survivor with remainder to the children of his said sister, their heirs and assigns forever. The testator died July 26, 1861.

It is conceded that the parents of these children were competent to hold real estate at the time of the testator's death, having before that time made and filed the deposition prescribed by section 15, article 2, title 1, chapter 1, part 2 of the Revised Statutes. (1 R. S., 720.) Their children, however, did not file any deposition nor become citizens until after the testator's death. The plaintiff contends that by reason of their failure to file depositions in conformity with the statute last cited (1 R. S., 720, § 15) *before the death of the testator*, the devise to them was void. A devise to a person, who at the time of the death of the testator was an alien not authorized to hold real estate, is declared by statute to be void. (2 R. S., 57, § 4.) It will be noticed that this statute impliedly declares that there may be aliens who are authorized, as well as aliens who are not authorized to hold real estate. The devisees in remainder in this case are collateral heirs of the testator, but being aliens, the common law incapacitated them from taking by descent, while it enabled them to take by devise or purchase, subject to forfeiture to the State upon an inquest of office found. (*Wadsworth v. Wadsworth*, 2 Ker., 376; *Goodrich v. Russell*, 42 N. Y., 177.) The disability to take by devise or purchase was created by statute. (1 R. S., 719, § 8; *id.*, 720, § 17.) Section 8 enumerates the persons capable of taking and holding real estate, and does not include an alien devisee. Section 17 incapacitates an alien from taking or holding any real estate which may have been devised to him before he became a resident, and made the deposition prescribed by 1 Revised Statutes, 720, section 15, before referred to. The question is, whether such disability has been removed in the case before us.

It is claimed on behalf of the devisees, Spalding and Lewin, that such disability has been removed by the provisions of the act of 1845 (chap. 115) to enable resident aliens to hold and convey real estate, etc. (4 Edm. St., 300.) The first section of that act provides that any alien resident of this State to whom any real estate has been or thereafter may be devised, before making the deposition mentioned may, on filing such deposition, hold the real estate devised to such alien in the same manner, and with the like effect as if such alien at the time of such devise were a citizen. These devisees are within that description of persons. There can be no doubt that this enactment protects and confirms the devise to Susannah E. Spalding, unless to give it that



effect would divest a vested estate in the citizen heirs of the testator. We think it had no such effect, but that its effect was to lessen the estate which but for the statute and devise would have descended to the citizen heirs, and to declare that the estate which actually descended to the latter, should be defeasible upon the filing of the depositions aforesaid. The statute cannot be defeated, but on the contrary, must be carried into effect, if any legal means can be devised for that purpose. We find no difficulty in performing that duty. For it is necessary only to hold that the estate which descended to the citizen heirs was subject to the operation of the statute; that the full effect of the devise was postponed until said devisees should file their depositions, and that in the meantime the estate was vested in the citizen heirs, subject to be divested by the filing of the depositions. That the legislature has power to make such a change in the rules of descent, we think admits of no question. (Cooley Const. Lim., 359, *et seq.*) It is equally clear, that the object of the act of 1845 was to remove the disabilities resting upon alien devisees, at the time of its passage, in case they filed the deposition referred to. It is worthy of mention that the fourth section of this act, also, in terms, enables alien heirs to take by descent from a resident alien, with the same effect as if such resident alien were a citizen. Strictly construed, this provision would not embrace a descent cast from a citizen. (See *Larreau v. Davignon*, 5 Abb. [N. S.], 367.) It is not necessary to decide whether such a construction would be compatible with the intent of the legislature manifested in the act; otherwise, we should be strongly inclined to hold that their intention in enacting the fourth section was to remove from resident aliens all disability to hold real estate by inheritance from a resident alien ancestor, who had acquired the same by purchase, and to confer upon them capacity to take and hold the same in case they should take the preliminary proceedings for becoming citizens. That object is in furtherance of enlightened public policy, and affords complete ground for a liberal interpretation of the statute. But whether such construction be correct or not, the capacity to take by descent, which this section confers upon resident aliens, authorizes them to hold real estate devised to them within the meaning of the statute of wills. (2 R. S., 57, § 4.) The statute certainly does not invalidate a devise to

one who is capable of taking and holding real estate, either by purchase, devise or descent from any person. It does not require a general capacity to take and hold by all modes of vesting estates, or a special capacity to take and hold by devise. It is enough if the devisee is capable of holding by either mode of devolving seizin of real estate. The case of *Heney v. The Brooklyn Benevolent Society* (39 N. Y., 333) is not in conflict with, but is rather confirmatory of, the foregoing views. That case arose under section 1 of the act of 1843 (4 Edm. Stat., 299), and there was no devise or grant in the case, but only a descent cast before the naturalization of the heirs. Section 1 of the act of 1843 only enabled heirs of the intestate who had become naturalized *before his death*, to inherit his estate; whereas the first section of the act of 1845, in terms, confers capacity to take upon alien devisees who have filed the deposition after, as well as those who had filed it before the passage of the latter act. Nor does the saving clause in the eleventh section of the act of 1845 qualify the operation of the provisions thereof to which we have referred, for the reason that that section excepts from the operation of the act only interests which had become vested before its passage; whereas the death of the testator did not occur until sixteen years after its passage.

The result is that, as respects Susannah E. Spalding, the devise is good by virtue of the original act of 1845, she having filed her deposition conformably to section 15 of the Revised Statutes, before cited, on the 23d of October, 1861. Jeremiah B. Spalding and Ann Sarissa Lewin have never filed the deposition required by that statute, but we think such omissions have been cured by statutes amending chapter 115 of the Laws of 1845. (Laws of 1874, chap. 261; Laws of 1875, chap. 38.) The latter act was passed March 3, 1875. This suit was not commenced until on or after July twenty-first, following. The act of 1875 confers upon heirs and devisees, being of the blood of the deviser, whether citizens or aliens, capacity to take and hold the real estate owned and held by the deviser at the time of his decease, whether such deviser was an alien or a citizen, except as against the State only. The saving clause contained in section 2 of the act of 1874 does not embrace the plaintiffs, because they claim by descent, and not by "devise, grant, gift or purchase."

The act of 1875, we think, was plainly intended to operate retro-

actively, and its effect was to render the title of all the devisees, under the devise in controversy, perfectly valid as against the plaintiffs, before the commencement of this action. In short, the estate of the heirs was defeasible on the devisees acquiring capacity to take the estate by filing the deposition. Then the acts of 1874 and 1875 dispensed with the formal act of filing a deposition, and conferred the requisite capacity to take without that formality.

The judgment and order appealed from must be affirmed, with costs.

Present — BAERNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment and order denying new trial affirmed, with costs.

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THOMAS H. GERATY AND JOHN N. KEIN, APPELLANTS,  
v. PHILIP H. REID, RESPONDENT.

*Justice of the peace in Brooklyn — jurisdiction of.*

By section 35 of chapter 125 of 1849, conferring the same jurisdiction upon justices of the peace in the city of Brooklyn, *in said city*, as justices of towns have by law *in respect to the towns*, the legislature intended to restrict the territorial jurisdiction of the justices to the city itself.

APPEAL from a judgment of the County Court of Kings county, reversing a judgment of a justice of the peace in favor of the plaintiff.

The only question presented by this appeal was as to the power of a justice of the peace of the city of Brooklyn to issue and cause a summons to be served on the defendant in this action, in the town of New Lots, in Kings county.

*John F. Baker*, for the appellants.

*Philip S. Crooke*, for the respondent.

GILBERT, J. :

Under the Constitution, as amended in 1869, justices of the peace in cities may be invested with such powers as shall be prescribed

by law. (Art. 6, § 18.) This is a new provision, and enlarges the power of the legislature. The case of *Brandon v. Avery* (22 N. Y., 469), therefore, is not now an authority on this point.

The powers of a justice of the peace in the city of Brooklyn are derived from the act of 1849, to establish courts therein (chap. 125, § 35). That act confers the same jurisdiction *in said city*, that justices of towns have by law *in respect to the towns*. We think the fair import of the act is to restrict the jurisdiction of justices of the peace territorially, to the city exclusively; otherwise no appropriate meaning can be given to the phrases "in said city," and "in respect to the towns," used in the act. If the legislature had intended to confer precisely the same jurisdiction as was possessed by justices of the peace in towns, they would have omitted those phrases and simply granted the same jurisdiction as had been granted by law to such justices. When the act of 1849 was passed, the legislature had no power to confer any jurisdiction upon a justice of the peace that was not strictly local. (*Brandon v. Avery, supra.*) It must be presumed, therefore, that the legislature intended to keep within the power then possessed by that body, and the language employed must be construed accordingly. We think, therefore, that the justice of the peace in this case acquired no jurisdiction by means of the service of the summons upon the defendant in the town of New Lots.

The judgment must be affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment affirmed, with costs.

JAMES A. R. HAY, RESPONDENT, v. JOHN HAY, APPELLANT.

*Setting aside of contract for fraud — offer to restore what was received under the contract — when necessary to be made in the complaint — Joinder of causes of action.*

Where an action is brought to set aside a contract, on the ground that the plaintiff was induced to enter into it through the fraud of the defendant, it is not necessary that the complaint should contain an offer to restore what has been received under it.

It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary.

A joinder in one complaint of a cause of action, arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and of a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper.

APPEAL from an order made at the Special Term, overruling a demurrer to the complaint.

*Samuel B. Higenbotam*, for the appellant.

*C. F. Wells*, for the respondent.

GILBERT, J. :

This is an appeal from an order of Mr. Justice BARNARD, at Special Term, overruling a demurrer to the complaint. The complaint alleges in brief, that the plaintiff is the son and sole heir and next of kin of James Hay, deceased. That while said James Hay was insane and under the duress and restraint of the defendant, on the 24th of September, 1869, the latter extorted from him an agreement in writing, and on the same day, with fraudulent intent and unlawful coercion, induced him to execute a will, wherein defendant is named sole legatee and executor. That on December 31, 1870, the defendant was appointed by this court, committee of the person and estate of said James Hay, who had been adjudged a lunatic.

That after the death of James Hay, the defendant concealing from the plaintiff, who had until then resided in Scotland, all facts relating to the mental condition and restraint of James Hay, by false representations induced the plaintiff to enter into an agreement with him, by which plaintiff waived all objections to the probate of

the will, and the defendant qualified, and has ever since continued to act as executor thereof. That thereafter, April 22, 1873, the defendant, by like concealment and false and fraudulent representations as to plaintiff's interest in his father's estate, obtained from the plaintiff a general release, individually and as executor, and the prayer of the complaint is that these four instruments be adjudged to be void.

The defendant demurs on two grounds: First, misjoinder of several causes of action, in uniting in one complaint the two frauds perpetrated upon the father with the two which were subsequently practiced upon the son; second, that the complaint does not state facts sufficient to constitute a cause of action.

A plaintiff who seeks equity, must do equity. Therefore, if he asks the court to decree a rescission of his contract with a defendant for the fraud of the latter, the court will not grant him the relief, unless he restores whatever he has received from the latter, and which rightfully belongs to him. That condition will be imposed whether there be an offer to restore in the complaint or not. It is, however, a condition of granting relief, not of instituting a suit. It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made in the complaint, that such an offer is necessary.

We think, therefore, that an offer to restore is not a necessary ingredient of the cause of action, and that a demurrer will not lie for the omission to insert such an offer in the complaint.

The joinder of the several causes of action in this case would not have rendered a bill multifarious according to the practice of courts of equity before the Code (Story Eq. Pl. [7th ed.], §§ 531 to 534, 539), and the Code is still more comprehensive. It authorizes such joinder when the several causes of action arise out of the same transaction or transactions connected with the same subject of action. The subject of this action is the disherison of the plaintiff, and each cause of action is directly connected therewith. (*N. Y. and N. H. R. R. Co. v. Schuyler*, 17 N. Y., 604.)

The order must be affirmed, with costs.

DYKMAN, J., concurred; BARNARD, P. J., not sitting.

Order overruled, demurrer affirmed, with costs.

ELIZA JANE PARKINSON, SPECIAL GUARDIAN OF GEORGE W. W. RINCHEY, AN INFANT, RESPONDENT, v. GEORGE H. M. JACOBSON AND MARY S. D. JACOBSON, HIS WIFE, MARY A. SHERMAN AND SYLVESTER J. SHERMAN, HER HUSBAND, AND OTHERS, APPELLANTS.

*Sale of infant's real estate — mortgage given by purchaser — want of title in infant — no defense to.*

In proceedings instituted for the sale of the real estate of an infant, it was alleged that his father, through whom, by descent, the infant acquired title to the property sold, was dead. A conveyance of the property was duly made in such proceedings to one Jacobson, who gave back a bond and mortgage to secure a portion of the purchase-money. This action was brought against the person to whom Jacobson had conveyed the premises, subject to the mortgage, and who had assumed the payment thereof, to foreclose the same. The defendant set up as a defense that the father was still living.

*Held*, that, as the answer failed to set up any eviction or disturbance of defendant's possession, the answer was properly stricken out as frivolous.

APPEAL from an order made at the Special Term, striking out a portion of the defendant Mary A. Sherman's answer as frivolous and irrelevant.

*Francis Byrne*, for the appellants. The allegations of the answer (stricken out) not being contradicted by affidavit, are to be taken as true; and they establish a total failure of title in said infant, and either a willful falsification or a mistaken assertion of the fact that said George Rinchey was not alive; and upon either the ground of fraud or mutual mistake, the contract of sale and the bond, mortgage and all conveyances should be set aside. (1 Story's Eq. [12th ed.], §§ 140, 141, 142, 143, 144; *Denston v. Morris*, 2 Edward's Ch. R., 37; *Roosevelt v. Fulton*, 2 Cow., 129; *Bennett v. Judson*, 21 N. Y., 238; *Bingham v. Bingham*, 1 Vesey, Senior, 127; *Stapleton v. Scott*, 13 Vesey, 425; *Hitchcock v. Giddings*, 4 Price, 135; *Champlin v. Laytin*, 1 Edw. Ch. R., 471; 6 Paige, 89.) Omission to make inquiries was not negligence. (*Mead, Adm'x, etc., v. Bunn*, 32 N. Y., 275.)

*W. T. Milliken*, for the respondent. A grantee of the equity of redemption, who has assumed the payment of the mortgage, cannot

contest the consideration of the mortgage. (*Shadbolt v. Bassett*, 1 Lans., 121; *Ritter v. Phillips*, 53 N. Y., 586; *Freeman v. Auld*, 44 id., 50.) Even the mortgagor in a purchase-money mortgage cannot be relieved, on the ground of a failure of title, unless he has been evicted. (*Curtis v. Busch*, 39 Barb., 661; *Bumpus v. Platner*, 1 Johns. Ch., 213; *Abbott v. Allen*, 2 id., 213; *Banks v. Walker*, 2 Sandf. Ch., 344.) The fact that there may be a decree *in personam* for deficiency does not alter the principle. (*Edwards v. Bodine*, 26 Wend., 109; *Miller v. Morrell*, 3 Edw. Ch., 560.) In order to have a right of action or counter-claim where all other conditions exist, there must be a surrender of the property to one having a paramount title. (3 Washburn, 403; *Simers v. Saltus*, 3 Denio, 214; *St. John v. Palmer*, 5 Hill, 599; *Curtis v. Busch*, 39 Barb., 661; *Walker v. McCarty*, 3 Johns., 471; *Kerr v. Shaw*, 13 id., 236.)

GILBERT, J.:

George W. Rinchey was the owner of real estate in the city of Brooklyn. Plaintiff was his wife and the infant ward was their child. The infant, by plaintiff, presented a petition to the Supreme Court in the city of New York, on the 27th day of November, 1867, stating that the father had died on the 20th of July, 1866, in Mexico, intestate, seized, etc., leaving the infant his only heir, and prayed for leave to sell said property. Plaintiff was appointed special guardian, and the several proceedings were had upon the petition resulting in an order for the sale and conveyance of the mortgaged premises, and pursuant to such order the same were sold and conveyed to one Jacobson. Jacobson gave back to the plaintiff the bond and mortgage in suit for a part of the purchase-money. Afterwards Jacobson conveyed said premises to the defendant Mary A. Sherman, and she assumed the payment of the mortgage. The defendants now set up as a defense to this action that Rinchey was alive when said order of sale was made, but do not aver any eviction or disturbance of the possession of said premises.

We think the defense was a sham one. It sets up no breach of covenant by the plaintiff nor any eviction of the defendants. It is well settled that where the purchaser remains in quiet and peaceable



possession of the premises, he cannot have relief against the contract to pay the purchase-money or any part of it on the ground of defect of title, nor does the fact that there may be a judgment for a deficiency against the defendants enable them to defend because of a failure of their title, until after an eviction. (Thomas on Mortgages, 292, *et seq.*; *Thorp v. Keokuk Coal Co.*, 48 N. Y., 256.)

The order must be affirmed, with costs and disbursements.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Order striking out parts of answer affirmed, with costs and disbursements.

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ASA W. PARKER, RESPONDENT, v. THE LONG ISLAND  
RAILROAD COMPANY, APPELLANT.

*Exemplary damages — when not allowable.*

The plaintiff, in pursuance of a contract made with the defendant, claimed to be entitled, by virtue of a commutation ticket, to ride to East New York. Having exercised this right for some time the defendant refused to carry him to that point unless he would pay extra fare from Jamaica to East New York; and upon his refusal so to do, in obedience to an order of the defendant, the conductor ejected him from the train, using, in so doing, no unnecessary violence. Upon the trial of this action, brought to recover damages for so doing, the court charged that the evidence was not sufficient to give punitive damages against the conductor, but that plaintiff was entitled to have the railroad company punished to such an extent as the jury should, in their discretion, say the facts authorized and demanded. *Held*, that the charge was erroneous.

APPEAL from a judgment in favor of the plaintiff entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Edward E. Sprague*, for the appellant.

*S. D. Morris*, for the respondent.

GILBERT, J. :

In July, 1876, plaintiff made an agreement with defendant to carry him for one year between Ridgewood and Brooklyn, and the agent of the defendant, with whom the contract was made, told the plaintiff that the commutation was good to either Long Island City, Bushwick or East New York. At that time the defendant gave him six commutation books for the months up to January, and promised to give the balance of the books before the expiration of the first six months. The books delivered were books of the Southern Railroad Company, the predecessors of the defendant. Plaintiff afterwards rode between Ridgewood and the three stations last named, respectively, his right to do so not having been disputed until about 25th September, 1876, when the defendant refused to carry him to East New York unless he paid the fare between Jamaica and East New York. Plaintiff tendered his ticket and refused to pay; thereupon he was ejected, pursuant to an order of the defendant, the conductor using only nominal force in removing him from the car. The jury rendered a verdict for \$400.

Assuming that the contract between the parties entitled the plaintiff to ride on the railroad running between Jamaica and East New York, the exclusion of him from the car was wrongful and the defendant is liable for the damages sustained by the plaintiff in consequence thereof. It may well be doubted, however, whether the plaintiff really had the right which he asserted. We have not considered that question, as there is another one which is decisive. The judge, after instructing the jury, as the evidence required him to do, that there was not sufficient evidence to give punitive or exemplary damages against the conductor, and that the plaintiff had admitted that he had suffered only nominal damages, gave this further instruction, namely, "that he" (the plaintiff) "is entitled to have this railroad company punished to such an extent as the jury shall, in their discretion, say the facts authorize and demand."

We think that the judge erred in permitting the jury to give exemplary damages. It was conceded that nothing in the conduct of the conductor warranted any thing more than compensatory damages. And yet the defendant is liable only for the acts of the conductor. The fact that he acted under the orders of the defendant, only proves the authority of the conductor to do the acts.

The law would imply the same authority from the nature of his employment. In *Hamilton v. Third Avenue Railroad Company* (53 N. Y., 30) the Court of Appeals, per GROVER, J., held that "no case for exemplary damages, had the action been against the conductor, was established, and if not against him, clearly not against the master." Upon principle, the rule cannot be otherwise where a conductor executes an order of his master which was given without evil intent. The case does not furnish the slightest evidence indicating that the company entertained any malice or ill-feeling toward the plaintiff, or that the order under which the conductor acted was given with any intention to injure the plaintiff, or with any other purpose than that of the assertion, in good faith, of a legal right supposed to belong to the defendant, and the performance of an official duty by the officer who issued the order. In such a case punishment is not deserved, and an example is not necessary. It is only in cases of moral wrong, recklessness or malice, that the exceptional rule of public policy, which allows exemplary damages, applies. (53 N. Y., *supra*.)

The judgment must be reversed, and a new trial granted, with costs to abide the event.

DYKMAN, J., concurred; BARNARD, P. J., dissented.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

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THE KNICKERBOCKER LIFE INSURANCE COMPANY,  
RESPONDENT, v. GEORGE W. NELSON AND OTHERS,  
APPELLANTS.

*Bonds and mortgages — usury in — by whom, after conveyance of the mortgaged property, it may be set up.*

One Nelson, on October 13, 1874, in pursuance of an usurious agreement entered into between himself and the plaintiff, executed and delivered to it four bonds and mortgages. On February 19, 1875, he conveyed the property covered thereby to one L., subject to the mortgages. On March 15, 1875, L. conveyed the same, subject to the mortgages, to W., who, on March 23, 1876, reconveyed the premises to Nelson, the conveyance not being stated to be subject to the mortgages.

In an action brought to foreclose the mortgages, *held*, that Nelson, being the "borrower," and the mortgages being liens only upon his own property, was entitled to set up the defense of usury and have the bonds and the mortgages collateral thereto declared null and void.

*Quære*, whether, if any of the intermediate grantees of the property had become bound for the payment of the bond and mortgage, the mortgage might not be considered as collateral security for that liability, and enforceable with it.

APPEAL, by George W. Nelson, from a judgment entered upon the trial of this action by the court without a jury.

*Morris & Pearsall*, for the appellant.

*Henry W. Johnson*, for the respondent.

GILBERT, J. :

This is an action to foreclose four mortgages executed by George W. Nelson to the plaintiff, upon premises situated in the city of Brooklyn, to secure the payment of his bonds for the aggregate sum of \$70,000, each dated on the 13th and recorded on the 15th of October, 1874, and to enforce the personal liability of Nelson upon said bonds. Nelson set up the defense of usury. The justice at Special Term found, as matter of fact, that the bonds and mortgages were executed pursuant to a corrupt and usurious agreement. He also found that, on the 19th day of February, 1875, Nelson and his wife conveyed the mortgaged premises to Felix W. Leinbach, Augustus Wellee and Simon C. Pettee, subject to the mortgages; that on the 15th of March, 1875, the said Leinbach, Wellee and Pettee, conveyed said premises to the defendant, Charles M. Watkins, subject to said mortgages; and that on the 23d day of March, 1876, Watkins reconveyed the premises to the defendant Nelson, which conveyance was not made subject to the mortgages in question, or either of them.

As conclusions of law the court found, that Nelson could not avail himself of the defense of usury so far as the mortgages affect the land covered thereby, but that as to his liability upon his bonds said defense of usury was available, and as to such liability said bonds and mortgages are usurious and void. Judgment was entered accordingly.

I think the facts found do not warrant the conclusion of law, and that Nelson was entitled to a judgment avoiding the bonds and mortgages altogether. He is the "borrower." As such he is entitled, by the express provisions of the statute, to have the usurious contract annulled, and the bonds and mortgages surrendered and canceled without paying or offering to pay any part of the money loaned. (1 Edm. Stat's, 725, § 8; 4 id., 160, §§ 4, 5; *Minturn v. Farmers' Trust Co.*, 3 Coms., 498; *Allerton v. Belden*, 49 N. Y., 378.) The usury having been proved Nelson is entitled to the relief provided by the statute, and I cannot find any authority for imposing any restriction upon such relief. If he is entitled to any relief at all it must be full relief, without any condition or limitation, for the reason that he is the "borrower," and has never been released from his obligation as such. The statute absolutely requires the court to afford that relief to a "borrower" who has legally established the invalidity of the usurious contract.

Nor is there any way by which a usurious debt or security, in whole or in part, can be rendered valid as an executory contract. The statute makes it void in its inception, and so it must forever remain. (*Miller v. Hull*, 4 Denio, 104; *Brackett v. Barney*, 28 N. Y., 333; *Cope v. Wheeler*, 41 id., 303-311-314-315.)

It has been held in many cases that a grantee of "the equity of redemption," as the interest of the mortgagor in mortgaged premises has been designated, is not a borrower within the meaning of the statute, nor in privity with him as to so much of the estate mortgaged as is necessary to satisfy the mortgage debt, and that, therefore, such grantee cannot question the validity of the mortgage. Various reasons for so incapacitating such a grantee have been assigned besides the lack of privity mentioned. By some it has been said that the mortgagor, by conveying the mortgaged premises, subject to the mortgage, or by assigning them upon trust to pay the usurious debt, makes an appropriation of the property for the payment of said debt; that if such grantee were allowed the defense it would not inure to the benefit of the borrower, but would operate to discharge such grantee *pro tanto* from the payment of the money which he had agreed to pay, and that the statute was not intended for such a purpose. (*Merchants' Ex. N. Bk. v. Com. Warehouse Co.*, 49 N. Y., 643, and cases cited.) Others have

said that a sale of the mortgaged premises, subject to the mortgage, is an affirmance of the mortgage. These reasons, however, can mean nothing more than that the mortgagor has put his grantee in a position that will disable him from setting up the usury; for no principle is better settled than that a usurious contract is wholly incapable of confirmation. It seems to me that the reason stated in *Hartley v. Harrison* (24 N. Y., 170), namely, that such grantee is a stranger to the usurious contract, and is not in privity with the mortgagor, because he took, not the whole estate, but the equity of redemption only, and therefore the usury does not affect him in his person or estate, would have better support, in principle, than either of the others mentioned, if a conveyance by a mortgagor of the mortgaged premises did not pass the entire estate therein. But, in this State, a mortgage is a mere incumbrance, extinguishable by a tender. The whole legal estate remains in the mortgagor, notwithstanding the mortgage (*Kortright v. Cady*, 21 N. Y., 343; *Ten Eyck v. Craig*, 62 id., 406, 421), and will pass by a conveyance from him, without any conveyance from the mortgagee, charged only with a lien for the mortgage debt. (Id.)

Whatever ground may be assumed, however, for incapacitating a grantee from setting up the defense of usury, the rule has had, and in the nature of things can have, no other effect, than to close his mouth. No conveyance, or other act of the grantor, can render valid the usurious debt or security; nor can a mortgage which is void for usury be converted into a valid charge upon the land described therein, otherwise than by surrendering the mortgage, purging the transaction of the usury, and executing a new instrument for that purpose. The argument that usurious mortgages can become *valid liens*, as against anybody, is not supported by any authority that I have met with. The most that has been decided upon that subject is, that grantees of the "equity of redemption" cannot be heard to allege the invalidity of them. In *Cope v. Wheeler* (*supra*), WOODRUFF, J., whose opinion is cited by the plaintiff held expressly, that the ability of a mortgagee to enforce his lien against his grantee, arose, not from the fact that the mortgage was not void as between the parties thereto, but the grantee was not at liberty to use that as a defense, having retained in his hands the amount.

Hence, a grantor who is the actual borrower, may still aver and prove the usury, whensoever it becomes necessary to protect himself or his property against liability for the usurious debt. If, after having conveyed the mortgaged premises, he is discharged from the debt, he ceases to be the borrower, for the reason that in fact, or in legal effect, he has returned the money borrowed, and the entire obligation of a borrower has been extinguished. A reconveyance to him of the whole estate mortgaged, and not of the "equity of redemption" only, would not revive the debt or rehabilitate him as a borrower, but would merely invest him with the rights of a purchaser. The statute was designed to relieve only the injured party to the usurious contract by releasing him from liability thereon. If this liability has been already discharged, nothing remains for the statute to operate upon. The security falls with the debt so far as the borrower is concerned. A grantee will be estopped from claiming that such discharge has avoided the security, when it appears that he took the land subject to it, and that the debt has not in fact been paid. The same principle of estoppel would be applicable to a grantee who had taken a conveyance, subject to a mortgage, which had been paid by the mortgagor. But, I apprehend that the mortgagor, on reacquiring the property, would not be estopped from pleading the payment of his mortgage in defense of an action for the foreclosure thereof. A mere purchaser from the grantee stands in his shoes. That is the principle decided in *Schermerhorn v. Talman* (14 N. Y., 93), for in that case the plaintiff, who was the borrower, repurchased the mortgaged premises after he had obtained a discharge in bankruptcy from all his debts. The decision is put distinctly upon the ground that he sought relief, only by virtue of the title which he acquired, after his discharge in bankruptcy. (See also *Wheelock v. Lee*, 64 N. Y., 247.) In the case before us Nelson is the maker of the bonds and mortgages, the usurious contract was made with him and he has never been discharged from liability thereupon, consequently he is entitled to have his bonds declared void. When that shall be done, the liens of the mortgages, being merely collateral to the bonds, will necessarily cease for the reason that they are liens only on his property. Those liens cannot be preserved as against Watkins, the defendant who made the reconveyance, for he no longer has any interest in the mortgaged premises, and he is

not liable for the payment of the usurious debt. The decree against him in this case is wholly inoperative and nugatory. If there had been a personal liability on the part of the defendant Watkins to pay the mortgage debt, perhaps it would not be in the power of Nelson and himself, by any act of their own, to release that liability without the consent of the mortgagee (see *Hartley v. Harrison*, [*supra*]; *Stephens v. Casbacker*, 8 Hun, 116), and in that case, if a strong desire to frustrate the statute of usury should be indulged, the mortgages might be treated as collateral security for that liability, and enforceable with it. But no personal liability on the part of Watkins exists. The mortgages, therefore, stand as liens on lands belonging to Nelson, created by him, as securities for his bonds only, on which he is still liable, and those bonds are void. He is entitled, therefore, to all the consequences of a successful defense of usury, namely, the avoidance of the usurious contract and all securities given in pursuance thereof. It follows that the judgment is right, so far as it adjudges the bonds to be void, but that it is erroneous so far as it directs or permits an enforcement of the mortgages against the land.

The judgment should be reversed, and a judgment in the usual form should be entered in favor of the defendant Nelson, with costs.

Present — GILBERT and DYKMAN, JJ. ; BARNARD, P. J., not sitting

Judgment reversed, so far as it decrees a foreclosure and sale under the mortgage set forth in the complaints, and judgment ordered that the bond and mortgage both be declared void, and that the complaint be dismissed, with costs.



JAMES HOYT, RESPONDENT, v. GEORGE W. MEAD,  
IMPLEADED WITH MARTIN R. MEAD, APPELLANT.

SAMUEL HOYT, RESPONDENT, v. SAME, APPELLANT.

*Note — addition of word "surety" to name of one joint maker — action how brought thereon.*

Where two persons execute a note and one of them adds to his signature the the word "surety" both are to be treated as makers of the note and may be joined as defendants in an action upon it; nor is the liability of the surety to the holder of the note affected by any equities existing between such surety and his co-defendant.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict directed by the court.

This action was brought upon the following note:

"\$1,400.

BEDFORD, April 1, 1871.

On demand for value received we promise to pay Samuel Hoyt, or order, fourteen hundred dollars with interest at seven per cent per annum.

M. R. MEAD,

GEO. W. MEAD,

*Surety."*

The complaint was, in the ordinary form, against the makers of a promissory note. On the trial the plaintiff produced and proved the note and the payment of certain interest thereon and rested. Whereupon the defendant George W. Mead moved that the complaint be dismissed as to him on the following grounds:

First. Generally that the complaint does not state facts sufficient to constitute a cause of action as against him, the said George W. Mead.

Second. That there was no evidence to bind him or make him personally responsible, nor could he be held as surety on the note in suit under the complaint, but that the plaintiff should have declared specifically on said defendant's contract as surety.

The motion was denied.

*J. W. Grief*, for the appellant. The objection that several causes of action were improperly united was properly taken by answer, it

not appearing upon the face of the complaint. (Code of Procedure, §§ 144, 147.) Causes of action so united must all belong to one of these classes, \* \* \* must affect all the parties to the action, \* \* \* and must be separately stated. (Code of Procedure, § 167; *Barton v. Speis*, 5 Hun, 60; *Allen v. Rightmere*, 20 Johns., 164; *Brewster v. Silence*, 4 Seld., 207; *Allen v. Fosgate*, 11 How. Pr., 218; *De Ridder v. Schermerhorn*, 10 Barb., 638; *Hier v. Staples*, 51 N. Y., 136; *Draper v. Snow*, 20 id., 331; *Henderson v. Marvin*, 31 Barb., 297.) A person who guarantees a note is, in no sense, a party to the note; his contract is special and must be specially declared on. Accordingly, where it appears upon the face of the instrument that one of the makers signs as surety, no recovery can be had against him without declaring especially on the contract. (Edwards on Prom. Notes, 219 [ed. of 1857]; *Ellis v. Brown*, 6 Barb., 282; 5 Wend., 307; 2 Hill, 190; *Allen v. Fosgate*, 11 How., 218; *Butler v. Rawson*, 1 Denio, 105; 1 Chitty Plead., 339.)

*Close & Robertson*, for the respondent.

GILBERT, J. :

The promissory note in suit is a contract between both defendants and the plaintiff, to pay a definite sum of money. It is the several promise of each defendant, and the joint promise of both. (*March v. Ward*, Peak, Ca., 130; *Clerk v. Blackstock*, Holt [N. P.], 474; 1 Pars., N. and B., 251.) They must, therefore, be treated as makers of the note, for to hold otherwise would contradict the note, which is not allowable. If, in fact, George W. Mead is a surety for his co-defendant, he may have certain equitable rights *aliunde* the contract, but that does not affect his liability to the plaintiff. (*Hubbard v. Gurney*, 64 N. Y., 457.)

All the makers of a promissory note may be joined in an action upon it, whether it be a joint or several contract. (Code of Civil Procedure, § 454; Code of Proc., § 120; Moak's Van Santvoord's Pl. [3d ed.], 124.)

No defense having been shown, the court properly directed a verdict for the plaintiff. The judgment should be affirmed.

Present — BARNARD, P. J., and GILBERT, J.; DYKMAN, J., not sitting.

Judgment affirmed, with costs.

MARGARET COSGROVE, AS ADMINISTRATRIX, ETC., OF JOHN COSGROVE, DECEASED, RESPONDENT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, APPELLANT.

*Negligence — in order to create liability, must contribute to or cause the accident.*

One Barringer was driving, plaintiff's intestate and himself being in a one-horse wagon, on a highway crossing defendant's railroad. While at a safe distance therefrom they became aware of the approach of an engine, and Barringer at once endeavored to stop the horse and succeeded in checking him, he started again and was again brought under control, but started a third time and ran into the engine. The bell of the engine was not rung as required by law.

In an action to recover damages for the killing of plaintiff's intestate, *held*, that although negligence on the part of Barringer could not be imputed to the deceased, yet as defendant's neglect to ring the bell did not contribute to, or cause the accident the plaintiff could not recover.

APPEAL from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

Plaintiff's intestate and one Barringer were riding in a wagon on a highway which crossed defendant's railroad. Barringer was driving, and the horse, becoming unmanageable, ran into the locomotive and plaintiff's intestate was killed. Barringer and plaintiff's intestate were aware of the approach of the defendant's train. The evidence, as to whether or not the bell on the engine was rung, was conflicting.

*Frank Loomis*, for the appellants.

*H. A. Nelson*, for the respondent.

GILBERT, J. :

The negligence imputed to the defendant consists of an omission to ring the bell or sound the whistle, as required by statute. (3 Edm. Stat., 643, § 7.) The evidence on this subject was conflicting, that on the part of the defendant being positive, and that on the part of the plaintiff being negative merely. Perhaps, under

the circumstances, the defendant's witnesses deserved the most credence. Still, I think, it was the province of the jury to determine the question of fact which arose upon the testimony on this point. Two of the plaintiff's witnesses testified, that the bell was not rung, not merely that they did not hear it ring; and it sufficiently appears I think that they were listening, and watching the approach of the engine. A nonsuit, therefore, would have been erroneous. Assuming that the bell was not rung, the case turns upon the question whether the omission to ring it caused the accident. The instructions given to the jury upon this subject were accurate and explicit. They were charged that "the accident must have been occasioned by the failure to ring the bell in order to make the defendants' liable." In *McGrath* against this defendant (63 N. Y., 528), the rule of law is laid down by the Court of Appeals thus: "Under the laws which make it the duty of railroad companies to put signboards and ring the bell and blow the whistle at railroad crossings, an omission of that duty, if the jury found that it contributed in any way to the accident, would make the defendant liable." In *Johnson v. Hudson River Railroad Company* (20 N. Y., 73), the same court, DENIO, J., delivering the opinion, held that, to carry the case to the jury the evidence on the part of the plaintiff must be such as, if believed, would authorize them to find that the injury was occasioned solely by the negligence of the defendant. In *Wilds v. Hudson River Railroad Company* (24 N. Y., 430), and in *Grippe* against this defendant (40 N. Y., 51), the same court expressly sanctioned and approved the following instruction to the jury, viz., that "if the deceased, knowing the position of the railroad, approached the crossing at such a rate of speed that he was unable to stop his horse before getting upon the track, and in consequence thereof the collision occurred, the plaintiff cannot recover."

The rule of contributive negligence is generally invoked for the determination of cases like this. That rule as stated by text writers generally, and very often when laid down by judges, embraces the element of fault, nonfeasance or misfeasance on the part of the plaintiff. The rule so stated would not be applicable to a case of mere casualty, where the plaintiff's injury was caused by his inability to control the vehicle by which he was drawn into collision

with the locomotive. And yet, I think in such a case, it would be most unjust to charge the defendant with the consequences of the plaintiff's misfortune. No doubt there are cases where, although but for the plaintiff's own act the injury would not have happened, the defendant has, nevertheless been held liable; as for example, where one incurred the peril of jumping from a vehicle in order to avoid imminent and greater peril, and where one lost his own life in a brave and meritorious effort to save the life of a little child. (Sh. & Red. on Neg., § 28; *Eckert v. Long Island Railroad Co.* (43 N. Y., 502), and cases governed by the principle of the "Donkey case" (10 M & W. 546), when a person by some negligence of his own has incurred danger by collision which he became unable to avert, and the other party by the use of ordinary care might have averted the danger. (*Kenyon v. N. Y. Central and Hudson River Railroad Co.*, 5 Hun, 479, and cases cited; *Radley v. London and N. W. R. Co.*, L. R., 1 App. Ca., 754.) But such cases are exceptions to the rule, that a party in an action against another, to recover damages for an injury alleged to have been caused by the negligence of the latter, must fail, unless he proves that the negligence alleged caused the injury.

In the case before us the deceased and one Barringer were riding in a wagon drawn by one horse, upon a highway which crossed the railroad. Barringer was driving. It clearly appears that they were apprised of the approach of the engine, while at a safe distance from the railroad, and Barringer immediately made an effort to stop the horse. There can be no doubt that if that effort had been successful, the collision would not have occurred. But Barringer was unable to stop the horse. He checked the speed of the horse for a moment, but the horse started again, and was again brought under partial control. At the moment of the accident, however, he started the third time, and as the occurrence is described by a witness, he plunged ahead until he came in collision with the engine. This testimony was not contradicted or impeached, and it points with conclusive force to the inability of Barringer to control the horse, as the cause of the death of the plaintiff's intestate. I apprehend that in such a case the law forbids a recovery, although the defendant was negligent, not because Barringer is chargeable with contributive negligence, for his negligence cannot

be imputed to the deceased (*Robinson v. N. Y. Central R. R. Co.*, 66 N. Y., 11), but for the reason that the defendant's negligence did not cause or contribute to the injury. It seems to me that this conclusion is a necessary result of the decisions of the Court of Appeals which have been cited, and of general principles governing cases of this kind.

It was submitted to the jury to decide whether the deceased would have been at the place of collision if the bell had been rung. Such an inquiry invited mere speculation and conjecture, without any adequate evidence to support a conclusion one way or the other, and has been justly condemned by authority. (*Reynolds* against this defendant, 58 N. Y., 252.)

For these reasons, we think that the motion for a new trial should have been granted.

The order must be reversed, and a new trial granted with costs to abide the event.

DYKMAN, J., concurred, BARNARD, P. J., not sitting.

Judgment and order denying new trial reversed and new trial granted, costs to abide event.

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CHARLES H. TUGMAN, RESPONDENT, v. THE NATIONAL  
STEAMSHIP COMPANY, APPELLANT.

*Contract for carrying goods — when not confined to goods shipped on shipper's own account — Removal of action to Federal court.*

The plaintiff, a resident of Chicago, entered into a contract with the defendant whereby the latter agreed to carry and transport from New York to Liverpool such merchandise, not exceeding a specified amount, as might be furnished by the plaintiff, during certain months, at a specified price. A portion of this merchandise was shipped by the plaintiff on his own account, and the remainder thereof was furnished by other persons, who made a contract with the plaintiff for its transportation. The bills of lading were made out at Chicago, the defendant receiving the goods at New York, paying the back freight and collecting the whole amount of freight from the assignees at Liverpool. After the making of the contract between plaintiff and defendant ocean freights

increased, so that, as the bills of lading made at Chicago charged for freights at the current rates, those being the rates agreed upon between plaintiff and the parties furnishing the merchandise to him for transportation, the amount received by the defendant at Liverpool for the ocean freights exceeded the amount which, by the terms of his contract, was to be charged to the plaintiff. In an action by the plaintiff to recover this excess, over the contract rates, which had been received by the defendant, *held*, that he was entitled to recover. To authorize the removal of an action from a State court to a Federal court it is not sufficient that it is alleged that the defendant was an alien, a citizen or subject of a foreign State or country at the time the petition for such removal was prepared, but it must appear that such was the fact at the time of the commencement of the action.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The referee found that on or about the 8th day of October, 1874, the plaintiff and the defendant and a certain corporation, known as the Erie and Pacific Dispatch Line engaged in transporting property from Chicago to New York for hire by their duly authorized agents, entered into a contract whereby it was agreed that the plaintiff should ship, or cause to be shipped, on the transportation lines of said parties 1,000 tons of merchandise from the port of Chicago, in the State of Illinois, to the port of Liverpool, in England, during the month of December, 1874, and the month of January, 1875, at such times and in such quantities as the said plaintiff might elect, and that the same should be carried and delivered from said port of Chicago to said port of Liverpool, the said defendant to receive as its proportion of the said freight of said merchandise from the said port of New York to the said port of Liverpool at the rate of thirty-one cents, gold, per 100 pounds, to be shipped under said contract.

That, in pursuance of said contract, the said plaintiff during the month of December, 1874, and the month of January, 1875, shipped and caused to be shipped from the said port of Chicago to the said port of Liverpool 2,003,305 pounds of merchandise by bills of lading, by which the consignees of the merchandise so shipped were to pay, on the delivery of the said merchandise at Liverpool aforesaid for the account of such shipper, at the rate of eighty-seven cents in American gold coin for and on account of the through carriage from Chicago to Liverpool for each 100 pounds.

That the said merchandise was carried by the defendants under said contracts and delivered to the consignees in Liverpool, England.

That when the several parcels of merchandise so shipped as aforesaid arrived from Chicago at the port of New York the said defendants received the same and transported said merchandise to Liverpool, and collected and received from the consignees of said merchandise, on the delivery of the same, the freight money due on said bills of lading for freight from Chicago to Liverpool, amounting in the whole to the sum of \$16,728 in American gold coin, convertible into currency or legal tender notes at the rate of \$110 for each \$100 in gold coin, as provided for in said bills of lading.

That the through freight which the said carriers were entitled under said contract to have and retain for the carriage and delivery of said merchandise, calculated at the rate of sixty-seven and a-half cents per 100 pounds, amounted to the sum of \$13,522.17 in American gold coin, as aforesaid, and no more, and the defendants have refused to pay over to the plaintiff the remainder and balance of the said money so collected and retained by said defendants, this being the sum of \$3,366.40 in American gold coin or \$3,703.04 in currency as aforesaid.

And, upon the foregoing facts, found as conclusions of law :

First. That under the contract aforesaid the defendants were only entitled to retain and have for the freight and carriage of the merchandise shipped under said contract, at the rate of sixty-seven and a-half cents per 100 pounds of the said merchandise.

Second. That the said amount of \$3,366.40 received by the defendants was so received for and on account of, and to and for the use of the said plaintiff, and that he was entitled to recover the same from the said defendants, or its equivalent, in legal tender notes, as aforesaid, being the sum of \$3,703.04, with interest from the 20th day of February, 1875, and that the said principal and interest to the date of the report, amounted to the sum of \$4,324.53 in currency, for which he directed judgment.

*John Chetwood*, for the appellant.

*S. S. Rowland* and *F. J. Fithian*, for the respondent.



GILBERT, J. :

Satisfactory proof was given of the actual making of the contract with the plaintiff. We are of opinion that the surrounding circumstances and the defendant's course of business, preclude the limitation which the defendant now seeks to put upon the contract, namely, that the defendant should carry goods only, of which the plaintiff should be the actual shipper. Nothing of that kind was said when the contract was made, and such a limitation would be inconsistent with the nature of the transaction. I should infer, from the evidence, that when contracts like that in this case are made, the engagements of the carriers created thereby, are dealt with as commodities, and are bought and sold for speculation on the exchanges, in the same manner as engagements for the future delivery of merchandise or stocks. The engagement of the defendant in this case was sold by the plaintiff in parcels to the several shippers of the merchandise. He testified to that fact explicitly, and the evidence was not contradicted. It appears also that the merchandise shipped was delivered to the Erie and Pacific Dispatch Company in Chicago, with orders from the plaintiff that the same should be delivered to the defendant in New York for transportation to Liverpool. The entry made on the defendant's books of the receipt of the merchandise indicates, very clearly, that it was received in the fulfillment of the defendant's contract with the plaintiff. The bills of lading also correspond with this version of the transaction. The alteration made in the duplicate handed to the defendant, cannot affect the rights of the parties, and I can discover no legal significance in the act, except to prove notice to the defendant that the shippers had agreed to pay for freight at a greater rate than that fixed by the contract with the plaintiff. It is needless to review all the evidence upon the subject. It is sufficient to say that upon an examination of it we have come to the conclusions expressed.

It is said that the agent of the defendant, by whom the contract with the plaintiff was made, was not authorized to enter into contracts except with actual shippers, and verbal evidence was given to that effect. But "actions speak louder than words." We are of opinion that the general course of business of the defendant, especially its acts and conduct in respect to this particular transaction,

and more especially the fact that the authority to make the particular contract in this case was communicated to the agent by means of a telegraphic dispatch, which contained no restriction or limitation whatever, are ample to prove both an original authority to make the contract, and a complete adoption by the defendant of the acts of the agent done under that authority.

The merchandise was sent from Chicago under what is called joint bills of lading, that is to say bills of lading executed by the Erie and Pacific Dispatch Company, under a general authority from the defendant. Those bills provided, in the usual terms, for the delivery of the merchandise to the consignees named therein in Liverpool, on payment of the freight stated therein, being that agreed upon between the shippers and the plaintiff, which, as before stated, was greater than would result from the addition of the freight specified in the contract between the defendant and the plaintiff to that which was payable for the carriage of the merchandise from Chicago to New York, freights from New York to Liverpool having advanced in price in the interval between the making of said contract and the shipment of the merchandise. In other words, the freight payable according to the bills of lading embraced a rate for ocean freight in excess of the rate specified in the contract between the defendant and the plaintiff. The merchandise thus sent came forward charged with a lien for all the freight. The defendant advanced to the Erie and Pacific Dispatch Company the amount of freight due that company, and upon the delivery of the merchandise in Liverpool, collected the whole freight specified in the bills of lading. The referee decided that the plaintiff was entitled to recover the excess so received by the defendant over the amount advanced to the Erie and Pacific Dispatch Company, and the freight stipulated for by its contract with the plaintiff, with interest on such excess. We are of opinion that that decision is correct, for the reason that such excess belongs, in justice and equity, to the plaintiff, and is recoverable as money had and received to his use.

The owners of the merchandise shipped have no claim against the defendant for such excess, for they have paid no more than they agreed to pay. As before stated, they merely purchased from the plaintiff his right to have the merchandise carried. If the plaintiff had acted as their agent in procuring such carriage, they might

claim that he was incapacitated from receiving the benefit of his contract with the defendant, and that such excess, in equity, belonged to them. And if such had been the case the owners would have had the right of action which the plaintiff here claims. The defendant, however, as long as the contract with the plaintiff remains in force, is divested of all right to retain such excess. The plaintiff did not act as agent of the owners. The merchandise was carried by the defendant under the liability to the owners created by the bills of lading, but the liability to return the excess of freight received, is one which the law implies in favor of the plaintiff and not of the owners. That the law does imply such a liability to somebody, is clear upon principle and authority. (*Moses v. Macferlan*, 2 Burr., 1005; *Eddy v. Smith*, 13 Wend., 490; *Colvin v. Holbrook*, 2 Coms., 130.) That the implication is in favor of the plaintiff is also clear. The defendant, it is true, did not, by its contract with the plaintiff, agree to collect freight due him, but having carried the merchandise and collected the freight upon bills of lading which required the consignees to pay a greater sum for freight than the contract with the plaintiff entitled it to demand, it did, impliedly, undertake to collect the excess for the person entitled thereto. Hence there is no lack of privity between the parties.

We think none of the exceptions of the defendant were well taken. It may as well be mentioned that many of the exceptions of the plaintiff have been argued as if the ruling had been adverse to, and the exception had been taken by, the defendant.

With respect to the point raised at the trial, that this court had been ousted of jurisdiction by the proceedings to remove this action into a Federal court, we are of opinion that the petition of the defendant was fatally defective, because it did not show that the defendant was an alien or citizen or subject of a foreign State or country at the time of the commencement of the action, but only when the petition was prepared. The defendant has also submitted to the jurisdiction of the court, and litigated the action upon the merits, before a referee appointed with its own consent. After these acts it was too late to take the objection of the want of jurisdiction.

The judgment must be affirmed with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment affirmed, with costs.

HENRY C. WYETH, RESPONDENT, v. CHARLES O. MORRIS  
AND OTHERS, APPELLANTS.

*Fraudulent representations — sale of bonds procured by — measure of damages.*

The defendants having, by false and fraudulent representations, induced the plaintiff to purchase certain railroad bonds, he, upon discovering the fraud some three years after the purchase, brought this action to recover the damages occasioned thereby. The defendants were acting as brokers, for both the purchasers and the sellers. Upon the trial the court charged, as to the measure of damages, that the plaintiff was entitled to recover the actual damages which resulted from defendants' conduct up to the time when he first discovered the fraud — the difference between the sum paid and the value of the stock — that is, the difference between the price paid and the actual value of the bonds at the time when the plaintiff discovered the fraud.

*Held*, that the charge was incorrect; that the measure of damages was the difference between the actual value of the bonds at the time of the sale and their value as they were represented to be.

APPEAL from a judgment in favor of the plaintiff entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried. The action was brought to recover damages alleged to have resulted from false representations, whereby the plaintiff was induced to purchase certain railroad bonds. By agreement between the defendants and the plaintiff a certain portion of the formers' commissions on the sale were allowed to the plaintiff.

*Wm. H. Leonard and John T. Hoffman*, for the appellants.

*E. Louis Lowe*, for the respondent.

GILBERT, J. :

This is an action for damages, which resulted from false and fraudulent representations of the defendants, whereby the plaintiff was induced to purchase twenty-five first mortgage bonds of the Selma, Rouse and Dalton Railroad Company, of \$1,000 each, at fifty-nine cents on the dollar. The defendants acted in the transaction as agents or brokers, for both seller and purchaser, and

received from the seller, as their commission for making the sale, five of the same kind of bonds for \$1,000 each, and paid the plaintiff, as his share of said commissions, \$250 in cash.

Upon the question of fact, whether the fraud alleged had been committed, we think the evidence was sufficient to carry the case to the jury. No exception was taken to the charge of the judge upon that subject. The evidence of the fraud, it is true, is not as satisfactory as a plaintiff, in an action of this kind, may reasonably be expected to produce. Still, it was the province of the jury and not of the judge, to determine its effect. The defendants made an unusual profit out of the transaction, without the knowledge or assent of the plaintiff. Such conduct is inconsistent with an agent's duty towards his principal, and it had a strong tendency towards establishing the fraud alleged. (See *Dorris v. French*, 4 Hun, 296.) We think, however, that the judge erred in his instruction to the jury respecting the rule of damages, namely, "that the plaintiff was entitled to recover the actual damage which resulted from their conduct up to the time when he first discovered the fraud;" and, again, "that the rule (of damages) is the difference between the *sum paid* and the value of the stock;" and, finally, "the damages are to be computed upon the principle—that is, the difference between the price paid, that is sixty, one per cent off—and the actual value of the bonds at the time when the plaintiff discovered the fraud."

The action seems to have been treated by the plaintiff, on the trial, as one against the defendants, as the sellers of the bonds, upon an actual rescission of the contract of sale. An amendment of the complaint was allowed for the purpose of making the action one of that kind. We think that amendment should not have been allowed. The defendants were only agents and not sellers. The action can be deemed one for deceit only. A principal cannot be made liable in such an action for the fraud of his agent, nor can the agent be made liable, as upon a rescission of the contract of sale, to restore the consideration, unless the principal was not disclosed, and the plaintiff dealt with the agent as principal. The liability of the defendants is for the *deceit*; and the rule of damages proper to be applied to them is the one governing such actions. That rule is a well-established and very plain one. The measure of damages is

the difference between the actual value of the bonds and the value of them as they were represented to be. Market value is pertinent but not conclusive evidence on such a question. It appears that these bonds had a market value, although they were not quoted on the stock list. Persons interested in the railroad made purchases and sales of the bonds long after the purchase by the plaintiff. Whether the plaintiff could have sold his bonds without cheating somebody else is not now the question. Generally speaking, a thing is worth the price it will bring in the market when it is offered for sale fairly and honestly. If it has no market-price, its value must be ascertained in some other way. But, howsoever it may be determined, it is the value at the time the fraud was committed which measures the liability of the person who committed the fraud. (*Haight v. Hayt*, 19 N. Y., 471; *Hubbell v. Meigs*, 50 id., 492.) The plaintiff has been allowed to recover the sum which he paid for the bonds with interest thereon, upon evidence that the bonds became worthless three years after his purchase. *Non constat*, that much of that depreciation should be attributed to causes which occurred after the plaintiff's purchase, and for which the defendants are not responsible. Such a recovery cannot be upheld.

Several exceptions to the admission of evidence were taken upon the trial. But as a new trial must be had on other grounds, we have not considered them.

The judgment and order must be reversed, and a new trial granted, with costs to abide the event.

BARNARD, J. (dissenting):

I am of opinion that the rule of damages was correctly stated in the judge's charge to the jury, at the trial of this action. If one person, by fraud, induces another to purchase stock, and the purchaser holds it until it becomes worthless, before he discovers the fraud, the measure of damages should be the difference between the price paid for the stock, with interest thereon, and the value of the stock at the time when the fraud was discovered by the purchaser. Otherwise, the rule as to damages for wrongs would not be observed, which is, that a wrong-doer must pay all damages resulting from the wrong done. Assuming that the stock purchased by the plaintiff was worth more at the time of the sale than

it was at the time when he discovered the fraud, still, it was the fraud which induced the holding of the stock, until the discovery, and the intermediate depreciation should be paid by the wrong-doer.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ. :

Judgment and order denying new trial reversed, and new trial granted, costs to abide event.

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ADELIA K. BROOME, RESPONDENT, v. HELEN F. TAYLOR  
AND JAMES T. TAYLOR, APPELLANTS.

*Action upon bond given by married woman — complaint in — what allegation it must contain.*

In an action against a married woman and her husband upon a bond executed by them, it is sufficient if the complaint allege the execution, and delivery thereof by the defendants to the plaintiff, and set forth a copy of the bond. It is not necessary that it should contain any allegation as to her separate property or business.

APPEAL from a judgment in favor of the plaintiff, entered upon an order overruling a demurrer to the complaint.

*Samuel J. Crooks*, for the appellants.

*M. P. Mason* and *Geo. C. Blanke*, for the respondent.

GILBERT, J. :

The complaint sets forth that defendants made and delivered to plaintiff, their bond, a copy of which is set out in full, alleges there was due plaintiff thereon, from the defendants, \$10,000 and interest, and demands judgment for that sum.

The bond purports to have been made by Helen F. Taylor and James T. Taylor, her husband, to the plaintiff.

The defendants separately demurred to the complaint, on the ground that said complaint did not state facts sufficient to constitute a cause of action.

On plaintiff's motion at Special Term, an order was made that the demurrer be overruled as frivolous, and plaintiff have judgment thereon with costs.

From this order an appeal was taken to the General Term, where the order was affirmed, and an appeal was then taken to the Court of Appeals, which appeal was dismissed and final judgment was entered in favor of plaintiff on the 13th day of June, 1877, for the amount claimed with costs, \$11,129.06. A motion by defendant for leave to answer over was denied at Special Term and at General Term, and the Court of Appeals dismissed defendant's appeal from the order denying said motion.

The present appeal is from the final judgment entered against defendants, June 13th, 1877, upon the order granting judgment on account of the frivolousness of the demurrers. This court has already passed upon the precise question in this case by the order overruling the demurrers. That order is *res adjudicata*. (9 Hun, 155; *Bouchaud v. Dias*, 3 Denio, 238.) Upon a re-examination of the subject, we think the judgment is clearly right. The act of 1860, as amended by the act of 1862, provides that "any married woman may, while married, sue and be sued in all matters having relation to her sole and separate property, in the same manner as if she were sole." "A married woman may be sued in any of the courts of this State, and whenever a judgment shall be recovered against a married woman, the same may be enforced by execution against her sole and separate estate, in the same manner as if she were sole." (3 R. S. [6th ed.], 161, §§ 84 and 86.)

It is not necessary that a complaint against a married woman upon her bond, should contain special allegations in regard to her separate property or business, but it is sufficient to give a copy of the bond. (Code of Proc., § 162; New Code, § 534.) This court recently decided at General Term, in the third department, that "since the statutes of 1860 and 1862, the special facts establishing the liability of a married woman need not be alleged in the complaint." (*Willsey v. Hutchins*, 10 Hun, 502.) And in *Frecking v. Holland* (53 N. Y., 422), ANDREWS, J., delivering the opinion of the Court of Appeals, said, "We are of opinion that a general complaint in an action upon a contract of a married woman is proper. \* \* \* If the contract sued upon is one she is not authorized to make, the objection should be



taken by answer and raised upon the trial." In *Smith v. Dunning* (61 N. Y., 249), the Commission of Appeals in an action against a married woman, held that "it was wholly unnecessary to allude in the complaint in any way to her coverture or separate estate. Her coverture was matter of defense to be set up if available, and the judgment against her is properly the same in form and effect as if she were unmarried." In *Westervelt v. Ackley* (62 N. Y., 507), a counter-claim against the plaintiff, was sustained, the court holding that she should have alleged in her reply that she was a married woman, and have resisted the defendant's demand on that ground, for if the point had been taken additional evidence might have been given by defendants to show plaintiff's separate liability, notwithstanding the coverture.

We have been referred to the opinion of ALLEN, J., in the case of *Nash v. Mitchell*, recently decided in the Court of Appeals, in which it was held that the onus was upon him who asserts the validity of a contract with a married woman to prove it. The question in that case related to the sufficiency of the evidence given upon the trial. That is quite a different question from that presented here, which involves merely the sufficiency of the complaint. The latter question is answered by the statutes and authorities cited. A married woman may be sued in the same manner as if she were sole.

The judgment must be affirmed.

Present — GILBERT and DYKMAN, JJ. ; BARNARD, P. J., not sitting.

Judgment affirmed, with costs.

JOHN COWEN, COMMITTEE OF MARTIN HIGGINS, A LUNATIC, RESPONDENT, v. JOHN QUINN, APPELLANT.

*Public officer — action against — where triable.*

The warden of the city prison, in New York, is a public officer, and an action brought to recover damages for an act done by him in virtue of his office, must be tried in the county of New York.

APPEAL from an order made at the Special Term, denying a motion to change the place of trial of this action.

*Wingate & Cullen*, for the appellant.

*James G. Tighe*, for the respondent.

GILBERT, J. :

Higgins (of whom the plaintiff is the committee) was committed to prison in New York as an insane person, April 22, 1877, by order of one of the Commissioners of Charities of that city.

The complaint alleges that an order was made by said Commissioners of Charities to deliver him to his friends, but that the defendant, "who then and there had the said Higgins in his charge and custody, by virtue of said order, refused to release him;" for which the plaintiff demands damages.

The defendant is warden of the city prison in New York, and as such he received and refused to release Higgins.

Defendant, after due demand to change the venue, moved to transfer the case to New York, on the pleadings, and an affidavit alleging :

I. That he had four witnesses, who resided in New York.

II. That he himself, as well as two of said witnesses, were public officers of the city of New York (said Quinn being warden of said prison), and could not leave the city without neglecting important public duties.

The plaintiff swore to but two witnesses, who reside in New Utrecht. The motion was denied, and the defendant appeals.

The defendant is a public officer, and the action is for an act done in virtue of his office. In such a case the statute (Code, § 983; former Code, § 124) requires that the action shall be tried in the county where the cause of action arose. We have no discretion in the matter.

The order must be reversed, with ten dollars costs and disbursements.

DYKMAN, J., concurred; BARNARD, P. J., not sitting.

Order denying change of place of trial reversed, with costs and disbursements to abide event, and motion granted.

IN THE MATTER OF THE APPLICATION OF THE PROSPECT PARK  
AND CONEY ISLAND RAILROAD COMPANY TO ACQUIRE  
TITLE TO LANDS OF MOYNAHAN AND OTHERS.

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*Taking land for railroad purposes — compensation to landowners.*

Under an act of the legislature certain land was taken to be used as a highway, one section of the act gave a license to a railroad company to lay their track thereon and use the same. This license was subsequently declared invalid, because no compensation was made to the owners for the additional burden thereby imposed upon their lots.

In a proceeding instituted by the company to acquire title to the land under the general railroad act, *held*, that the commissioners to appraise damages should regard the land in the avenue as still forming a part of the parcels to which it had belonged, but subject to the easement of a highway, and should award as damages the difference between the market value of the whole property from which the railroad was to be severed, before the taking, and its value after the taking, with the railroad upon the land taken.

APPEAL from an order confirming the report of commissioners of appraisal appointed to appraise the compensation to be made by the petitioner, the railroad company, for the real estate proposed to be taken by the company for the purposes of their incorporation. The strip of land proposed to be taken by these proceedings is in the center of a public highway called Gravesend avenue, which had

been opened and graded by commissioners, pursuant to chapter 531 of the Laws of 1873, and an act amendatory thereof, being chapter 216 of the Laws of 1874. The company do not seek to extinguish the fee, but to acquire the easement for railroad purposes.

The strip in question is owned in fee by twenty-two different owners, as appears by the petition and report herein, subject to the perpetual easement of the public therein as a highway.

The act allowing the railroad company to construct a steam road had been passed and had become a law, before the commissioners for opening Gravesend avenue had done any act under their appointment except to organize.

The commissioners herein awarded one dollar in each case, except three. In one of those three dollars and in the other two six cents.

*Benjamin G. Hitchings*, for the landowners, appellants.

*John H. Bergen*, for the respondent.

GILBERT, J. :

Notwithstanding the positive language of the seventeenth section of the general railroad act, the court has power to deny the motion to confirm the report of the commissioners of appraisement, upon proper cause being shown. It is not, however, sufficient cause to show that the commissioners erred in the *quantum* of compensation awarded; that is a matter which can be properly brought up for review only by an appeal from the report of the commissioners. (*Matter of N. Y. Central Railroad*, 64 N. Y., 60; Gen. Railroad Act, chap. 140 of 1850, § 18; L. 1854, ch. 282, § 6.)

Such an appeal is now before us, and it appears, from the papers, that the commissioners acted upon the principle that the landowners were entitled only to nominal damages. No doubt there have been cases where land in a highway has been taken for public use, in which the owner suffered only nominal damages; as, for example, where the taking was a benefit rather than an injury to the landowner, and the property actually taken had no appreciable value. The case of *The Southside R. R. Co. v. Broisted*, cited by the petitioners, it is to be presumed was such a case. It does not appear here, however, that the landowner has suffered more than nominal

damages. The taking of the land in the highway for the use of the railroad is a fresh taking of the property of the landowner, for which he is entitled to just compensation. Gravesend avenue was not taken originally for a railroad but only for a highway. The land was taken for that easement only. (Laws of 1873, chap. 531, § 4.) The license granted by the thirteenth section of that act, to the petitioner, to build and operate a railroad on said avenue, was ineffectual, because compensation had not been made for the land taken for that use, and the exercise of that license made the petitioner a trespasser. We are not called upon to review that legislation, for we have no power to reject it. Persons who complain of the injurious effects of statutes are quite too much in the habit of looking to the courts for redress, whereas the only remedy for such evils lies with the people alone, and consists in their power to turn out an unfaithful representative and to put a better man in his place. It does not follow that because the license was unavailing, that the damages, which are recoverable for a continuing trespass, constitute the measure of compensation to which the landowner is entitled for the taking of the land for such use. The rule is clearly otherwise. When the petitioner shall have duly acquired the property it will have a perfect right to use it for the purposes of a railroad. Such a use becomes at once lawful, and any indirect or consequential injury which may happen from such use, without fault or negligence of those who use the railroad, is *damnum absque injuria*. That principle was settled in *Radcliff's Exrs. v. Mayor of Brooklyn* (4 Comst., 195), and it has been followed ever since. What, then, is the rule of damages? I think it is in substance, the rule suggested by the respondent's counsel, namely: "The true inquiry is, what was the whole property from which the railroad was severed, fairly worth in the market, before the taking, and what was its value, after the taking, with the railroad upon the land taken?" After a careful consideration of the authorities I am satisfied that this is the true rule. If the railroad has benefited the land owner, such benefit cannot be taken into consideration, but in such case the value of the land actually taken must be awarded. But in determining such value, allowance must be made for the easements to which the land had been previously subjected. In some cases that would naturally reduce the compensation to be awarded to a

nominal or nearly nominal sum. If the taking is an injury to the landowner beyond the value of the land actually taken, such injury must be measured by the depreciation of his remaining property, which was caused solely by such taking ; for, it is only for the *taking of property* that the Constitution requires compensation to be made. The legislature may, unquestionably, require compensation to be made for indirect and consequential damages ; but they have not done so in the present instance. We are, therefore, remitted to the provision of the Constitution which requires compensation to be made for the *taking of private property*, and not for the *use* to which the property may be legally subjected *after* it has been taken.

Applying that rule to the case before us, we think the commissioners should regard the land in the avenue as still forming a part of the parcels to which it belongs, but subject to the easement of the avenue. The compensation to be awarded will be ascertained by an application of the principle stated, to land in such a condition.

The report of the commissioners must be set aside and sent back to Daniel Chauncey, James S. T. Stranahan and Richard Ingraham, who are hereby appointed commissioners.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Order affirming report of commissioners reversed, and report set aside and proceedings sent back to Daniel Chauncey, James S. T. Stranahan and Richard Ingraham, commissioners, without costs to either parties.

IN THE MATTER OF THE PETITION OF GEORGE W. MEAD TO  
REDUCE AN ASSESSMENT.\*

*City of Brooklyn — vacating assessments in — burden of proof — sec. 13 of chap. 633 of 1875.*

Since the passage of section 13 of chapter 633 of 1875 the statutory remedy, by petition, against void or avoidable assessments for local improvements in the city of Brooklyn, is confined to that portion of any such void or voidable assessment which is in excess of the fair value of the work actually done and the materials actually furnished, and which is, consequently, the result of fraud or extravagance.

As it is only that portion of the assessment which is in excess of the fair value of the actual local improvement which is subject to review by petition, it rests upon the petitioner to allege and prove the existence and amount of such excess.

As the right to review an assessment by petition was created by an amendment to the city charter, which amendatory act had a charter title, such right could be constitutionally abridged or taken away by another amendment to the charter, having also a charter title. Any other construction would make the grant of the remedy by petition unconstitutional.

APPEAL from an order made at the Special Term, reducing an assessment on certain lots of the petitioner from \$243.18 on each lot to the sum of fifty-dollars on each of them.

The application was made to have an assessment on certain lots belonging to the petitioner reduced, on the ground that the amount of such assessment exceeded one-half of the assessed valuation of the lots and was in violation of section 5 of chapter 169 of 1861.

*William C. De Witt*, for the city of Brooklyn, appellant.

*George W. Mead*, in person, and *Jesse Johnson*, for the respondent.

DYKMAN, J. :

This case presents a most important statute for construction. It is contained in section 13 of chapter 633 of the Laws of 1875, and is as follows :

\* See Matter of Adams, *post*, 355.

Section 30. "None of the provisions of any act of the legislature of this State shall enable or permit any court to vacate or reduce any assessment in fact or apparent, whether void or voidable, on any property, for any local improvement in the city of Brooklyn otherwise than to reduce any such assessment to the extent the same may have been, in fact, increased in dollars or cents by reason of fraud or irregularity, and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement, be thereby disturbed."

This statute does not abridge the powers of this court otherwise than in respect to a single remedy against assessments granted by special legislation. Actions in equity or proceedings under the writ of *certiorari* being within the original jurisdiction of the Supreme Court are not affected.

The subject for consideration is, therefore, limited to the summary remedy by petition. This remedy was first instituted in and for the city of New York by a special act (chap. 338) passed April 17, 1858, entitled "An act in relation to frauds in assessments for local improvements in the city of New York." This act enabled courts in that city, on petition by a party aggrieved, and after short notice to the city, to investigate the proceedings leading to any assessment, and upon the discovery of fraud or irregularity, to vacate the same by a summary order. This remedy was extended to the city of Brooklyn by a section in an act to amend the charter of Brooklyn, passed in 1862, and it has since been regulated and modified in and for Brooklyn by several charter amendments. (See Laws of 1862, p. 205, chap. 63, § 43; id., 1871, chap. 483; id., 1873, chap. 863, § 38.)

As the title to the act which instituted it indicates, this summary judicial proceeding owes its existence, no doubt, to the frauds and extravagance which characterized, at one time, the internal administration of the affairs of the city of New York, and, to a less extent, the city of Brooklyn. As the old common-law writ of *certiorari* afforded a sufficient and appropriate means for trying the statutory validity of any assessment, it is not likely the legislature had in view mere technical illegalities. Nevertheless, as such was the language of the act, the courts were compelled to permit the remedy to extend as well to questions of statutory regularity as to matters



of substantial fraud. It became, therefore, not merely a swift means of redress against the burdens imposed by official corruption and fraudulent contracts, but also a ready process by which, upon barely technical grounds of law, immense amounts of public indebtedness were taken from those who should have fairly borne the burdens, and thrown upon the city at large. It is a matter of public judicial history that large assessments for which there were outstanding city bonds, were vacated because an advertisement had been omitted from one out of many newspapers, or the common council had acted in one capacity rather than another, or some preliminary formality had been neglected, and for a large number of other like subtle reasons having little support in sound justice; and it has been said that upward of 1,000 petitions of this character were pending in this court upon the adoption of the statute now under construction.

It is obvious, therefore, that in the adoption of this statute the legislature intended to limit the power of the courts to that portion of any assessment which might be the product of fraud or extravagance. While upon the one hand the party assessed should not be held liable for the corruption or improvidence of city officials, upon the other that portion of the completed city which had hitherto borne the expense of its own local improvements should not be compelled, by mere technical defects, to bear the same expense for the new and incomplete portions of the city. At least, in view of the fact that the remedy by *certiorari* afforded full redress against purely statutory irregularities, there could be no just legislative motive for adding thereto a summary remedy by petitions.

Hence in 1873 the legislature provided with reference to this remedy, "that whenever any irregularity or fraud shall be shown in any such assessment proceedings, whereby the expense of any local improvement has been unlawfully increased, the court shall thereby only have authority to reduce the assessment by as much as it had been increased by such fraud or irregularity." (Laws of 1873, chap. 863, § 38.) Under the severe rules governing statutory construction it was held that where the irregularity was jurisdictional the increase referred to in this statute covered the whole amount involved, or was from nothing to the amount assessed. Then,

at last, the legislature passed, in behalf of the city of Brooklyn, the statute of 1875 (chap. 633), which, in precise and explicit language in reference to void or voidable assessments (in § 13), prescribes that in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual improvement, be by this remedy disturbed.

It seems, therefore, from the substance and history of this legislation, that the statutory remedy by petition against void or voidable assessments in the city of Brooklyn is now confined to that portion of any such assessment which is in excess of the fair value of the work actually done and material actually furnished, and is, consequently, the result of fraud or extravagance. Courts will not, by subtle construction, defeat an object of the legislature so persistently pursued and at length plainly attained.

Having thus reached a clear construction of the statute in question, the points presented by the respondent are easily disposed of. It being established that the amount contained in any assessment in excess of the fair value of the actual local improvement is the only subject-matter for the exercise of the remedy by petition, it is manifest, from the most elementary rules of evidence, that the petitioner must prove the existence of such an amount. This excess is the sole cause of action, and until, as matters of fact, it is disclosed, the court is forbidden to act. Indeed, this remedy never had any thing to do with lawful and fair assessments. It can only reduce void and voidable assessments the amount they have been increased; not by reason of pure invalidity, because that would include the whole, and render the statute meaningless; but the amount they have been in fact increased in dollars and cents by reason of such fraud; or, if there be only statutory irregularity, the amount in which such irregular assessment may exceed the fair value of the actual local improvement involved. The whole statute must be taken together, and it confines this remedy to the excessive charge.

The affirmant in any action or proceeding must show each essential ingredient of his cause of action. In actions for malicious prosecution the plaintiff must allege and prove want of probable cause, and in summary proceedings to eject a tenant for holding over without permission, the landlord must affirmatively prove the

want of permission. Under the statute in question the remedy is restrained to the amount in excess. This amount is not merely an ingredient of the petitioner's cause of action; it is his whole cause of action. It is not simply a condition to the exercise of the remedy; it is the only subject-matter upon which the remedy can act at all. It is obvious, therefore, that the petitioner must disclose it before the court can move; and to say that it can be taken as presumptively proven by the appearance of statutory irregularity, is to violate the whole spirit and purport of the act, which, in terms, protects against just such technical disturbance, that which concededly is void or voidable and exist only in fact or appearance.

In the present proceeding it appearing by the assessment roll that a certain proportion of the assessment was in excess of a limitation to one-half of the value of the property assessed prescribed by the act of 1861 (chap. 169, § 5), and hence invalid, the court below, without taking further proof, assumed the power to cancel the invalid amount. Here was obvious error. It is in respect to void or voidable assessments, in whole or part, that the statute provides that that proportion thereof (*i. e.*, of that which is void) which is equivalent to the fair value of the actual local improvement, shall in no event be disturbed. If the mere appearance of the invalidity were sufficient then the restraint upon the remedy is nugatory, and the whole object of the statute may be defeated. What if it does appear that the assessment is, in whole or part, void or voidable? It is in respect to that very thing that the remedy is limited.

It is not necessary to notice the constitutional objection that such a provision restricting a court remedy cannot be included in a charter act. The remedy itself was granted for the city of Brooklyn by a charter act, and never otherwise. It has been too frequently acted upon by our highest courts to be disturbed, and to hold that it was not thus lawfully granted would turn the petitioner out of court. If, then, the remedy might be granted by a charter act, it could be modified, altered or repealed by a charter act. The act giving the remedy, and the act restricting it, springs from the same source of legislative power alone. The remedy which the legislature could establish in the charter act of 1862, it could alter in the charter act of 1875, and the petitioner must use it as altered in 1875, or he cannot use it at all.

It is idle to endeavor to imply authority outside of charter acts from the act of 1871. True, that act has not, in terms, a charter title, but it consists of a single section which provides that section 43, chapter 63 of the Laws of 1862 (the amendment to the charter giving the present remedy in Brooklyn and with a charter title), shall read as follows — rewriting the sections in different form.

This merely amends the act of 1862 through the same form it was originally passed. Indeed, according to the express terms of the act of 1871, its single section must be read as section 43 of the act of 1862, and under the title of that act of 1862. This leaves the whole legislation under charter titles. Again, the title to the act of 1871, though not in precise terms is still in substance, a charter title. (*People ex rel. Rochester v. Briggs*, 50 N. Y., 553.) The criticism founded on the fact that the statute in question is made a substitute for the last section of the charter which reads, "This act shall take effect immediately," instead of some other section, is frivolous. The legislature adds, in the amendment, another section to the same effect, and if it did not, the Constitution fixed the period for the commencement of the operation of all laws containing no specific provision on the subject. This, like all the other subtleties employed to vacate assessments only enforces the necessity of applying the restraints imposed by the legislature, limiting the courts in summary proceedings to matters of substantial grievance.

The order of the Special Term must be reversed, with costs.

BARNARD, P. J., concurred ; GILBERT, J., not sitting.

Order reversed, with costs and disbursements.

IN THE MATTER OF THE PETITION OF RUSSELL W. ADAMS AND  
OTHERS TO VACATE AN ASSESSMENT, ETC.\*

*Vacating assessments in Brooklyn — chap. 663 of 1875 — chap. 169 of 1861.*

Since the passage of section 13 of chapter 663 of 1875, in relation to vacating assessments in the city of Brooklyn, the provisions of section 5 of chapter 169 of 1861, directing that "no assessments on any piece or parcel of land shall exceed in amount one-half of the value thereof," is no longer in force, so as to justify the reduction of an assessment in accordance therewith.

APPEAL from an order made at the Special Term reducing assessments on plaintiffs' lots. The plaintiffs applied to have assessments upon certain lots in the city of Brooklyn owned by them reduced and vacated. Upon the hearing the justice decided as follows:

"The assessment against lands of Jane Hoffman and Helena Rogers, between Dean and Bergen streets, should be vacated.

"The item for extra work in changing the grade from Sackett street to the city line, amounting to \$4,195.20, should be deducted from the gross amount of the assessment, together with interest, collectors and assessors' fees thereon.

"I find from the proofs that the actual amount of benefit accruing from said improvement is to the extent of seventy-eight and one-third per cent of the prices charged, allowed and assessed, and the assessment is sustained to that extent and vacated as to the balance, the same having been increased to that extent by irregularities.

"I also further find that upon those lots where the assessment exceeds in amount one-half of the assessed value that the amount of such excess is an irregularity, and to that extent should be vacated, it appearing in these cases that the actual fair value of the improvement does not exceed one-half of the assessed value of said lots."

*Edward B. Merrill*, for the petitioner.

*Wm. C. De Witt*, corporation counsel.

\* See Matter of Mead, ante 349.

DYKMAN, J. :

The assistance of the legislature, in relation to assessments for the opening of streets and avenues, has been frequently invoked in behalf of the city of Brooklyn, and the great object of all such legislation has been to devise a plan by which, on the one hand, the party assessed should not be obliged to bear any burden of taxation imposed upon him by official corruption or improvidence, and on the other, the portion of the city which had already borne the expense of its own local improvement should not be compelled by mere technical defects to pay the expense of an improvement in the new portion of the city also.

The first steps towards this consummation was made by the enactment in the law of 1861, that no assessment on any parcel of land should exceed in amount one half of the value thereof. (Chap. 169, Laws 1861, § 5.) This provision, however, was entirely in the interest of the landholder and left the expense of improvements beyond the one-half of the land assessed therefor to fall on the city at large. As a remedy for this evil, chapter 483 of the law of 1871 was enacted, and was re-enacted by section 38 of title 18 of chapter 863 of the Laws of 1873, which last law is the amended charter of the city of Brooklyn. This section provided that "whenever any irregularity or fraud shall be shown in any such assessment proceedings, whereby the expense of any local improvement has been increased, the court shall thereby only have authority to reduce the assessment by as much as it has been increased by such fraud or irregularity." This enactment was intended as a step in the other direction in the interest of the city. It was soon found to fall far short of the object for which it was intended, for the courts were obliged to hold, that where the irregularity was jurisdictional the increase referred to covered the whole amount involved, and so the whole assessment might, under this statute be entirely swept aside for the merest irregularity, and the whole expense of the improvement be thrown upon the city at large. This was the state of the law when section 13 of chapter 633 of the Laws of 1875, amending section 30 of chapter 863 of 1873, was enacted as follows: "None of the provisions of any act of the legislature of this State shall enable or permit any court to vacate or reduce any assessment, in fact or

apparent, whether void or voidable on any property for any local improvement in the city of Brooklyn, otherwise than to reduce any such assessment to the extent the same may have been in fact increased in dollars and cents by reason of fraud or irregularity, and in no event shall that proportion of any such assessment which is equivalent to the fair value of any actual local improvement be thereby disturbed." Thus, in plain and unequivocal language is accomplished what the legislature has had steadily in view, since its first enactment in 1861. We have been called upon for a construction of this statute at the present term of the court in the Matter of the Petition of Mead, and have held that by it the legislature intended to limit the power of the court to that portion of any assessment which might be the product of fraud or extravagance, and that the statutory remedy by petition against void or voidable assessments in the city of Brooklyn is now confined to that portion of any such assessment, which is in excess of the fair value of the work actually done and material actually furnished, and is consequently the result of fraud or extravagance. That the jurisdiction and power of the court is limited to that portion of an assessment void or voidable, which is in excess of the value of the work done and material furnished, and that, inasmuch as the excess beyond the fair value of the improvement is the only subject-matter for the exercise of the remedy by petition it rests with the petitioner to show the existence of such amount.

Now in this proceeding, under appropriate allegation for that purpose in the petition, testimony has been taken on both sides in respect to the value of the work done, and a finding has been made by the court which is not very intelligible in the light of the facts disclosed by the appeal book. The decision is, that the whole assessment against the lands of Jane Hoffman and Helena Rogers, between Dean and Bergen streets should be vacated. No reason is disclosed for this sweeping vacation and none can be gathered from the papers. It is plainly at war with the statute of 1875, if not with that of 1861.

The next clause in the decision is, that the items for extra work in changing the grade from Sackett street to the city line, amounting to \$4,195.20 should be deducted from the gross amount of the assessment, together with interest and collectors and assessors' fees

thereon. Here there is a deduction from the assessment in dollars and cents without any decision or finding that it has been increased by fraud or irregularity, or that it is in excess of the fair value of the work actually done: even if there was fraud or corruption that proportion of the assessment which is equivalent to the fair value of the work actually done can, in no event, be disturbed thereby.

Then there is a finding that the actual amount of benefit accruing from the improvement, is to the extent of seventy-eight and one-third per cent of the prices charged, and the assessment is sustained to that extent, and vacated as to the balance, the same having been increased to that extent by irregularities.

Under none of the statutes mentioned above has the benefit accruing from any improvement been given any influence whatever in determining the validity of any assessment. Under the statute of 1861 no assessment could exceed one-half of the value of the land assessed, and under the statute of 1875, as we have seen, the text is ignored, and the excess above the fair value of the work made the only subject for the action of the court. Neither can an assessment be increased by statutory irregularities. Fraud or irregularity is made by the State the foundation of the jurisdiction of the court in these proceedings, but the assessment can only be reduced by reason of corruption or extravagance.

It is further found, that upon those lots where the assessment exceeds in amount one-half of the assessed value, the amount of such excess is an irregularity and to that extent should be vacated, it appearing in these cases that the actual fair value of the improvement does not exceed one-half of the assessed value of said lots. The finding that the assessment in excess of the one-half of the assessed value of the lots is an irregularity is under and in obedience to the law of 1861, which, as we have seen, is no longer controlling. The last part of the finding looks as though it was intended to conform to the statute of 1875, but it is really a recital of what appears rather than a finding of fact, and it is impossible to gather the fact from the papers on appeal.

We think, therefore, the court has subordinated its actions to the rule established by the law of 1861 in the disposition of this case, and has not yielded to the statute of 1875 the control which it must have.



The court below may have refused obedience to the statute of 1875 by reason of the constitutional objection, that the powers of the court possessed under the law of 1862 cannot be abridged by a charter act. We have examined that question in Mead's case and find no embarrassment in it at all. The powers of this court to vacate assessments in the city of Brooklyn, by summary orders on petition of the parties aggrieved was first given by chapter 63 of the Laws of 1862, above mentioned. That was a charter act, and by it the provision of the act entitled "An act in relation to frauds in assessments for local improvements in the city of New York, passed April 17, 1858, were extended and made applicable to the city of Brooklyn and to the proceedings relative to any assessment for the local improvement therein.

The same law was adopted in the act to amend the charter of the city of Brooklyn in 1873, which was also a charter act, so that all the jurisdiction over the subject which is possessed by the court comes through charter acts, and it was certainly competent for the legislature to amend the charter of the city in the way it has done by the charter act of 1875.

The order appealed from must be reversed with costs and disbursements.

BARNARD, P. J., concurred ; GILBERT, J., did not sit.

Order reversed with costs and disbursements.

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GILBERT S. TERRY, APPELLANT, v. THE FLUSHING,  
NORTH SHORE AND CENTRAL RAILROAD COM-  
PANY, RESPONDENT.

*Railroad company — tickets issued by — right of passenger to stop over.*

On February seventeenth plaintiff purchased from defendant at Patchogue an excursion ticket to Brooklyn which stated, " Good until three days after date. Excursion ticket," and on the same rode to Brooklyn. On the following day he took a train from Brooklyn which arrived at Babylon late at night and did not connect with any train for Patchogue. He drove to the next station east,

remained there over night and in the morning took a train for Patchogue from which he was ejected by the conductor, in compliance with a regulation of the company providing that stop-over checks should not be given on excursion tickets.

*Held*, that the company were authorized to remove him, and that he was not entitled to recover, no unnecessary violence having been used.

That plaintiff, under his contract with the company, could only demand a continuous passage, and had no right to stop over at intermediate points.

APPEAL from a judgment in favor of the defendant entered upon a nonsuit ordered at the Circuit, and from an order denying a motion for a new trial made upon a case and exceptions.

*Miller & Tuthill*, for the appellant.

*Edward E. Sprague*, for the respondent. The defendant was entitled to make any and all reasonable rules with reference to the use of its tickets, and was not bound to make such rules known to the public except in response to inquiry. (*Dietrich v. Penn. R. R. Co.*, 71 Penn. St., 432; 3 Am. Railway Rep., 439, 440; *Cheney v. Boston and Me.*, 11 Metc., 121.) The plaintiff having elected to purchase a ticket of a peculiar character is chargeable with knowledge that the ticket was subject to restrictions, and was bound to inquire what those restrictions were. (*Dietrich v. Penn. R. R. Co.*, above cited.) The plaintiff voluntarily started from Brooklyn upon a local train which had no Patchogue connection at Babylon, and of that fact he is chargeable with knowledge. (*Gale v. D., L. and W.*, 7 Hun, 670.) The plaintiff had no right to stop over. He had a right to take any through train from Brooklyn to Patchogue (within the time limited) and to insist upon being carried through. This right was reciprocal; "and the defendant had a right to insist that the plaintiff's journey should be continued until completed, and that defendant should not be required to perform in fragments." (*Gale v. D., L. and W.*, above cited; *Churchill v. Chic. and Alton*, 3 Am. Railway Rep., 430; *Dietrich v. Penn. R. R.*, above cited; *Cheney v. Boston and Me. R. R.*, 11 Metc., 121.)

DYKMAN, J.:

Railroad companies are common carriers of passengers as well as of freight and baggage. This results from their setting themselves

up for common public employment for hire. It is their duty, therefore, to receive all persons who apply for passage, provided the applicant is not an unfit person to be received, and has no evil design against the carrier in its business. The right of passage, however, is subject to the right of the carrier to prescribe reasonable regulations for the accommodations of passengers and for the due and orderly arrangement of the business. In the exercise of this right passenger carriers have found it convenient to adopt what is called the ticket system; that is, the practice of issuing tickets to all persons who pay their fares.

These tickets are vouchers that the fare has been paid. They do not constitute the contract with the passenger, although they may and often do have upon them some condition or limitation which enters into it and forms a part of it. The contract is made up of the ticket and the rules and regulations established by the carrier, and is what is known in law as an entire contract. The carrier undertakes, in consideration of the payment of a certain sum, to carry the passenger in safety from one point to another at or within a prescribed time. Time in these contracts is usually an important element, because inasmuch as the carrier is required to furnish accommodation for all persons who apply for passage on any day, it is of importance to know how many are to be carried, and this cannot be known if there are persons holding tickets who have the right to apply for passage along the route in numbers entirely unknown. This would lead to endless confusion and great discomfort, and to avoid these evils the railroad companies issue tickets which contain on their face a limitation of the time within which they are to be used, and then such limitation constitutes a part of the contract. They also make arrangements to run some of their trains past some stations and for stopping some trains at all stations, and they issue time tables which show how the trains are to be run in this respect. These are necessary and reasonable regulations and persons purchasing tickets do so with reference and subject to them, and become bound by them. In fact, as has been observed before, they form a part of the contract. If the passenger does not know of the existence of these rules and regulations, it is his duty to inform himself in respect to them, by proper inquiries before commencing his journey; especially is it his duty to ascertain by what train he

can start, of its time of departure and arrival, its stopping stations and his right to get off the train and to resume his trip on another.

In this case the plaintiff on the 17th day of February, 1876, purchased of the agent of the defendant at Patchogue, an excursion ticket from that place to Brooklyn, containing on its face the words, "Good until three days after date, excursion ticket." On this ticket he rode to Brooklyn on the same day, and on the following day he returned from Brooklyn on a train which reached Babylon late in the evening, and made no connection with any train for Patchogue. On arriving at Babylon the plaintiff drove to Bay Shore the next station east, and there spent the night, and on the morning of the nineteenth took the train at Bay Shore for Patchogue. It was a regulation of the company that stop-over checks were not given on excursion tickets, and when the plaintiff presented to the conductor the ticket above mentioned it was refused, and he was ejected from the car without unnecessary violence, and this action is brought to recover damages for such expulsion. The plaintiff was nonsuited at the Circuit, and within the rules hereinbefore mentioned that was a proper disposition of the case. The plaintiff had the right to a continuous passage from Brooklyn to Patchogue. The defendant had made a contract with him to carry him between those points, and he had the right to demand the passage on any day between the seventeenth and the nineteenth, but he could only demand a continuous passage; he could not require the company to perform in fragments. Before taking his seat it was his duty to ascertain whether it would convey him to his place of destination.

So far as the terms of the plaintiff's contract were expressed on the ticket they were binding, of course, and that part of it was as follows: "Flushing, North Shore and Central Railroad. Brooklyn to Patchogue. Good until three days after date. Excursion ticket." This gave no right to any thing but a continuous passage, and he could not interpolate into it a provision permitting him to stop off of the train at intermediate points. In fact, no such right exists except by means of stop-over tickets, or the regulations of the company. (*Elmore v. Sands*, 54 N. Y., 515; *Beebe v. Ayres*, 28 Barb., 275; *Gale v. Delaware, L. and Western R. R. Co.*, 7 Hun, 670; *Dietrich v. Pennsylvania R. R. Co.*, 71 Penn., 432.)

The carriage of passengers by railroads has now come to be very

extensively carried on, and the rights, duties and liabilities of the companies and the passengers are well defined; and while the courts administer the law with severity against these companies in cases of negligence in the performance of their duties, they must, at the same time, be equally careful that nothing is imposed upon them beyond just legal responsibility.

The judgment must be affirmed.

GILBERT, J., concurred; BARNARD, P. J., not sitting.

Judgment and order denying new trial affirmed, with costs.

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WILLIAM B. TULLIS, ASSIGNEE, ETC., RESPONDENT v. WILLIAM  
S. MILLER AND HORACE WEBSTER, APPELLANTS.

*Assignee in bankruptcy — actions by — jurisdiction of State courts over.*

This action was brought upon an undertaking given to procure the discharge from arrest of one Miller, who had been sued by the plaintiff, as an assignee in bankruptcy, to recover money collected by Miller for the bankrupt, which he had failed to pay over. Plaintiff having recovered a judgment in the first action for \$2,195.50 and taken the necessary measures to charge the bail, brought this action upon the undertaking. *Held,*

That the action was properly brought in the State court and could be maintained. That even if the amendment to the bankrupt act, passed in 1874, operated in any case to deprive the State courts of jurisdiction over an action brought by an assignee in bankruptcy, this case was not affected thereby, for the reason that the cause of action did not arise under the laws of the United States, and that it was not brought for the collection of the legal assets or debts of the bankrupt.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

*Treadwell Cleveland*, for the appellants.

*James A. Hudson* and *Newton A. Calkins*, for the respondent.

DYKMAN, J. :

This is an action on an undertaking given to procure the discharge of the defendant, Edward F. Miller, from arrest in a civil action. The plaintiff was the assignee in bankruptcy of Ernest Sacchi, and as such commenced an action in the Supreme Court of this State, against Edward F. Miller, for the recovery of money which he had collected for the bankrupt and had not paid over. In that action an order of arrest was obtained from a justice of the Supreme Court, against Miller, and he was held to bail in the sum of \$1,800 ; in pursuance of which he gave an undertaking, in the usual form, executed by himself and the defendants in this action. He was thereupon discharged from arrest, and the action proceeded to judgment in favor of the plaintiff against him for \$2,119.52. The necessary measures were taken to charge the bail and this action is now brought on the undertaking. At the trial a verdict was directed for the plaintiff for the amount claimed, and a motion for a new trial on the minutes was denied, and the case now comes here on appeal from the judgment entered on the verdict and from the order denying a motion for a new trial.

The principal objection made here by the appellant has reference to the power of the State court to entertain the action, and is predicated upon the claim that the legislation of congress has been such as to give exclusive jurisdiction of the action to the courts of the United States. Before the amendment of the bankrupt law, in 1874, such jurisdiction was not exclusive, and the Court of Appeals of this State held, in November, 1873, that in an action brought by an assignee in bankruptcy to recover the estate of the bankrupt, the provisions of the bankrupt act conferring jurisdiction in such cases upon the District and Circuit Courts of the United States were not intended to interfere with, and did not exclude, the jurisdiction of the State courts. (*Cook v. Whipple*, 55 N. Y., 150.) In June, following this decision, the law was amended by the addition of a proviso: "That the court having charge of the estate of any bankrupt may direct that any of the legal assets or debts of the bankrupt, as contradistinguished from equitable demands, shall, when such debt does not exceed five hundred dollars, be collected in the courts of the State where such bankrupt resides, having jurisdiction of claims of such nature and amount." (Laws of 1874, p. 178, chap. 390, § 2.)

The claim is, that by allowing actions for the collection of the assets of a bankrupt, not exceeding \$500, to be prosecuted in the State courts, it was designed by the amendment to limit and restrict their jurisdiction to the class of cases arising under the proviso; and the General Term of the Supreme Court in New York city has substantially so held. (*Olcott v. Maclean*, 11 Hun, 394.)

That was an action for the recovery for personal property which, it was claimed, had been disposed of in fraud of the bankrupt law, and was therefore for the recovery of the assets of the bankrupt, and arose under the laws of the United States; and it may be that the United States courts, since the amendment, have exclusive jurisdiction of such actions. Contrary to this, however, it has been held by the General Term of the Supreme Court in the fourth department, that the only effect of that act is to permit the Federal courts to decline to entertain actions brought to recover assets of a bankrupt not exceeding \$500 in amount; that it does not take away the jurisdiction of the State courts, but permits the Federal courts to relieve themselves in certain cases. (*Wente v. Young*, New York Weekly Digest, Nos. 13, 14, Dec. 3, 1877, p. 295; 12 Hun, 220.)

If we were obliged to decide the question, our inclination would be towards this construction; but on this point our position is that this case is not within the inhibition, for the reason that the cause of action did not arise under the laws of the United States, and is not brought for the collection of the legal assets or debts of the bankrupt. The cause of action here accrued to the plaintiff by operation of law, as the result of an action prosecuted by him in the Supreme Court. The bankrupt never had any interest in the claim upon which the action is founded. True, the money when collected on the claim in suit, will come to him in his capacity of assignee and go into the estate of the bankrupt and be administered under that law; but that is not the test. The question is, in what cases does the amendment of the law confer exclusive jurisdiction upon the United States courts? and the answer is, in those only that are prosecuted to collect the legal assets or debts of the bankrupt. Moreover, it is very doubtful whether exclusive jurisdiction can be conferred upon the United States courts over actions of this character. The Constitution provides that the judicial power shall extend to all cases arising under the laws of the United States (arti-

cle 3, section 2); no power is delegated to congress to legislate beyond this limit. All powers possessed by the State governments and not delegated to the United States, are retained. (Federalist, No. 32.) If congress can clothe the United States courts with exclusive jurisdiction over this class of cases, it must be because that power has been expressly delegated to it by the Constitution of the United States. This has not been done. The language above referred to is its nearest approach, and this comes very far short of it.

Our conclusion is, therefore, that the State court has jurisdiction of this action, and that the judgment must be affirmed, with costs.

BARNARD, P. J., concurred; GILBERT, J., did not sit.

Judgment affirmed, with costs.

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ISAAC H. TICE, APPELLANT, v. WILLIAM ZINSSER,  
RESPONDENT.

*Contract — agreement to cancel — right to recover money paid under.*

The plaintiff and defendant entered into an agreement, by which the plaintiff agreed to purchase certain land from the defendant for a price therein named; the plaintiff paid a portion of such price to the defendant. Afterwards, the plaintiff being in default, an agreement, of which the following is a copy, was indorsed on each copy contract, and signed and sealed by the respective parties: "I hereby surrender all my right, title and interest under and by virtue of the within agreement to ——— for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, and agree that the same shall be canceled and be of no effect from this date."

In an action by the plaintiff to recover what he had paid under the contract *held*, that he was entitled to recover.

APPEAL from a judgment in favor of the defendant, and from an order setting aside a verdict in favor of the plaintiff, and directing judgment in favor of the defendant.

On March 23, 1871, the plaintiff and defendant herein entered into a contract whereby the former agreed to buy and the latter to



sell certain real estate for the sum of \$16,000, payable as therein provided, and plaintiff then gave to defendant the sum of \$1,000 on account thereof. Subsequently, and in October, 1871, the plaintiff being then in default by having failed to pay the purchase-price as provided by the contract, there was indorsed upon one contract the following agreement: "I hereby surrender all my right, title and interest under and by virtue of the within agreement to Isaac H. Tice for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, and agree that the same shall be canceled and be of no effect from this date," signed and sealed by the respective parties. A similar indorsement to William Zinsser was indorsed on the other contract.

This action was brought by the plaintiff to recover the money which he had paid upon the contract-price prior to its cancellation.

*J. Stewart Ross*, for the appellant.

*Lewis Sanders*, for the respondent.

DYKMAN, J. :

By the indorsement put upon the agreement in October, 1871, it was rescinded and canceled, and as this indorsement contained no conditions the parties stood towards each other as if no agreement had been made between them.

The plaintiff could recover nothing for any improvements he had put upon the property because there was no undertaking to pay for them, and the defendant could not retain the money that had been paid on account of the property, in expectation of a fulfillment of the contract and a conveyance of the property for the reason that he canceled the agreement and accepted a surrender of the premises unconditionally and without any stipulation for compensation. (*Gillet v. Maynard*, 5 John., 86; *Battle v. Rochester City Bank*, 3 N. Y., 88.)

It is claimed on the part of the defendant, that as the plaintiff could not have recovered back the money he had paid on the agreement before the indorsement thereon of the contract of rescission, he cannot now recover back the money paid, because he has surrendered his right to do so. We cannot subscribe to this propo-

sition. It was entirely competent for the parties to make a new contract to surrender and cancel the original agreement and they did so, and that left them in the condition in which they stood before the agreement was made. So standing the defendant was left no reason for retaining the money he had received. Before he rescinded the agreement, he could stand upon that and declare his readiness to carry it out, and the plaintiff would have no refuge but in fulfillment. He had paid his money in pursuance of an agreement which called for it and which could be executed, and his rights, liabilities and remedies were all to be sought for within its provisions, and they called for the money he had paid and other money beside. But the defendant voluntarily surrendered all these rights, and thus gave up his right to hold the money under the agreement.

These considerations lead to the conclusion that the judgment appealed from must be reversed.

The order vacating the verdict must also be set aside and the plaintiff must have judgment upon his verdict with costs.

GILBERT, J., concurred.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment and order setting aside verdict and dismissing plaintiff's complaint reversed, and judgment ordered for the plaintiff on the verdict.

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GEORGE COCHRAN AND OTHERS, APPELLANTS, v. OLIVER R. INGERSOLL, IMPEADED, ETC., AND OTHERS, RESPONDENTS.

*Attachment for contempt — when it should not be allowed.*

Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue.

APPEAL from an order made at the Special Term denying an application to issue an attachment against the defendant for a contempt.

It appeared by the papers upon which the motion at Special Term was made, that a judgment was entered providing that certain parties to a certain subscription paper who had not paid their subscriptions (plaintiffs and defendants being parties to said subscription paper) should pay in the amounts of their said subscriptions to a receiver to be appointed to receive the same, and that upon such sums being paid in, the aggregate sums should be distributed, *pro rata*, among all the subscribers thereto, after allowing for the payment out of said aggregate subscription for certain lands, for the purchase of which said subscription was made.

The receiver was appointed, the amount to be paid to him under the decree was computed and ascertained. A demand was made on respondent Ingersoll, who was one of the parties to the subscription, but such payment was not made.

Plaintiffs obtained an order to show cause why an attachment should not issue against Ingersoll for contempt, and on the return of said order Ingersoll showed by affidavit that he was wholly insolvent, and had been so for years, and that he was wholly unable to comply with such judgment.

The court at Special Term denied the motion for an attachment and plaintiffs appeal.

*P. V. R. Stanton*, for the appellants.

*Britton & Ely*, for the respondent Ingersoll. There can be no such thing as a contempt for not paying a debt which a man has no money or property wherewith to pay. (3 R. S., part 3, chap. 8, title 13, § 20; *Lansing v. Lansing*, 41 How., 248-252; *Wartman v. Wartman*, Taney, 362; *O'Callaghan v. O'Callaghan*, 69 Ill., 552; *Lane v. Losee*, 11 How., 361; *Meyers v. Trimble*, 1 Abb. Pr., 220-223; *Quintard v. Secor*, id., 393-398; *Meyers v. Trimble*, id., 399.)

DYKMAN, J. :

This is a proceeding for the enforcement of a civil remedy. The respondent has been ordered by the court to pay a sum of money

to the receiver and has failed to comply with the order, and now an attachment is applied for to punish him for a contempt of court in not obeying its order. The reason assigned by the respondent for not paying the money in compliance with the order is, that he has not got it and cannot pay it. The fact of his inability to pay stands uncontradicted on the record before us, and there is no claim that he has disabled himself to pay, for the purpose of avoiding compliance with the order of the court. On the contrary, it appears that he has been insolvent for the last nine years, and has received a discharge under the insolvent laws of the State from all his debts, including the claim in question.

The court is not called upon to vindicate either its dignity or its process, but simply to assist a suitor in the collection of a claim, and there is a solid and obvious distinction between contempt, strictly such, and those offenses which go by that name, but which are punished as contempt only for the purpose of enforcing some civil remedy. (Revisers' notes.)

Our statute provides that the court ordering imprisonment for contempt may in its discretion, in cases of inability to perform the requirements, relieve the person imprisoned in such manner and upon such terms as shall be deemed just and proper. (3 R. S. [6th ed.], 841, § 20.) Ample power is thus given to inquire into the circumstances after imprisonment, and there is no good reason why it should not be made before the commitment. (*Doran v. Dempsey*, 1 Bradford, 490.)

If the attachment should issue and the respondent be committed under it, he would then, on application to the court, be released from confinement by showing the same state of facts which appears in answer to this application. Why, then, should the mere formal proceeding be gone through with? We think that the inability of the respondent to comply with the order is a sufficient reason, under all the circumstances of this case, why the attachment should not issue, and that the order appealed from should be affirmed with costs and disbursements.

Present — BARNARD, P. J., and DYKMAN, J.; GILBERT, J., not sitting.

Order denying attachment affirmed, with costs.

CATHARINE WAIT, RESPONDENT, v. THE AGRICULTURAL  
INSURANCE COMPANY, APPELLANT.*Policy of insurance — "unoccupied" — meaning of.*

A policy of insurance issued upon a dwelling-house provided that if it should cease to be occupied by the owner or occupant in the usual and ordinary manner in which dwelling-houses are occupied as such, the policy should become void. The house was occupied by a tenant, who, on March fifteenth, commenced to move out, and removed most of his furniture and all of his family from the house. No person was left in it, and on the night of the sixteenth it was destroyed by fire.

*Held*, that the question whether or not the house was unoccupied at the time of the fire, within the meaning of that term as used in the policy, was properly left to the jury.

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

*Starbuck & Sawyer*, for the appellant.

*Hackett & Williams*, for the respondent.

DYKMAN, J. :

This action is upon a policy of insurance by which the defendant agreed to insure a dwelling-house of the plaintiff, which was occupied by a tenant. The defense is that notice and proof of the loss were not properly given as required by the policy, and that the house was unoccupied at the time of its destruction. The notice of the loss did not conform to the requirements of the policy, but the omissions have all been waived. On the 27th day of April, 1876, the secretary of the defendant wrote to the plaintiff that the company had learned about four weeks before that the house had burned, and requested her to make proof of loss on a blank enclosed and to verify the same, and return it to the company at her convenience. This was a sufficient waiver of all objections down to that time.

On the 30th day of May, 1876, the assistant secretary again wrote to the plaintiff acknowledging the receipt of her letters and papers, stating that they were very incomplete, but that the principal diffi-

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culty was that she swore the house was occupied at the time of the fire, whereas the company had good information that no one lived in the house at the time it burned. He declined to pay the loss, but did not call for further proofs, as he was bound to do then, if those furnished were incomplete or insufficient. Not having done so, he must be deemed to have accepted those furnished as sufficient. But this is not all. On the 6th day of June, 1876, the assistant secretary wrote to the attorney for the plaintiff a letter acknowledging the receipt of one from him on the fifth, and using these words in a sentence by itself, "We do not care for more proof."

It is fair to presume that these words were used in reply to an offer by the lawyer in his letter to furnish more proofs if desired. These facts show an acceptance of the proofs furnished as sufficient, and a waiver of all objection and omission.

But it is urged that the house was unoccupied at the time of the fire, and for that reason the policy had become null and void. The condition in the policy is that if the dwelling-house thereby insured shall cease to be occupied by the owner or occupant in the usual and ordinary manner in which dwelling-houses are occupied as such, then the policy shall be null and void until the written consent of the company shall be obtained. This dwelling was occupied by a tenant, who, on the fifteenth day of March, commenced to move out and removed most of his furniture and all of his family from the house, intending doubtless to return and take the remainder of his furniture, and then surrender the possession to the owner. No person was left in the house, and on the night of the sixteenth it was destroyed by fire. There was some proof that the plaintiff did not know and had no notice of the removal of her tenant, and although the testimony was objected to, yet it was proper to show that the plaintiff was guilty of no negligence in not notifying the defendant of the vacancy of the premises. The charge of the court is not contained in the case, but we are bound to presume, as there were no exceptions to it, that the jury was properly instructed on all the questions in the case. It appears, however, from the appellant's points that the question whether there had been a breach of the condition of the policy requiring occupation or no was submitted to the jury, and that is now assigned for error. We need not stop to consider whether it was error or not, for there was no exception to

the charge, and no objection can now be heard against it. Neither was there any error in denying the motion for a nonsuit, for the point we are now considering was not properly presented, and the objection respecting the sufficiency of the notice is not valid, as we have already seen.

The question is presented, however, by the appeal from the judgment and the order denying the motion for a new trial on the minutes of the court. If this house was occupied at the time of its destruction in the usual and ordinary manner in which dwelling-houses are occupied as such, then the policy was not void, but was in full force at that time. As commonly used and understood the word "occupation" is synonymous with "possession;" according to Webster, occupancy is the act of taking or holding possession, and occupy means to take possession, to keep in possession, to possess, to hold or keep for use, and as used in this policy the word ought to be given its most extensive signification and no forfeiture should be permitted, except there has been a plain violation of the condition when so interpreted.

Dwelling-houses are ordinarily used for places of abode, and the persons who occupy them are sometimes out of them and sometimes in them. Often it happens that they are left for a day and more by the occupants who are absent from them either for business or pleasure, and yet in such case no one would say the house was unoccupied within the fair meaning of that word. In the eye of the law it would be in the possession of the person or family residing there. So it also often comes to pass that the occupants of dwelling-houses are changed, and the incoming tenant cannot commence his occupancy until the outgoing one has removed, and do all they both can, there will be a point of time when there is no person in the house, but is the house therefore vacant? The law is not unreasonable and will not pronounce a house unoccupied because no human being draws the breath of life within its walls. Whole families go out to divine service on the Sabbath day and in the evening, and leave their residence without a human being, but yet they are not unoccupied. Where shall the line be drawn? Can an outgoing tenant take time for the removal of his household goods after his family has left the house, provided the time taken be reasonable? It seems but fair and just that such should be the

rule, and if so, how can it be determined what is a reasonable time, and whether the house has become unoccupied, better than by leaving the question to a jury under proper instructions.

The case of *Paine v. The Agricultural Insurance Company* (5 N. Y. S. C. [5 T. & C.], 619), was properly disposed of by the General Term, but the condition in the policy and the facts there were so unlike those in this case that it cannot have much influence as authority. In that case the court, after observing that it is not necessary that some person should live in the house every moment, but that there must not be a cessation of occupancy for any considerable portion of time, uses the following language: "For what length of time it may remain unoccupied will depend upon the circumstances of each case, and the jury or the referee must determine the question in view of the consideration that led to the incorporation of the proviso into the policy, and the necessity that not unfrequently arises for persons insured to leave temporarily their dwelling-houses."

*Whitney v. Black River Insurance Company* (9 Hun, 37) was an insurance of a saw-mill, and does not shed much light on this case, but the referee there found that the premises did not become vacant and unoccupied, and gave judgment for the plaintiff, which was affirmed by the General Term. The question seems, therefore, to have been there regarded as one of fact to be determined in view of all the circumstances.

In this case, the cessation of actual inhabitancy, was for a very short time, and the premises had not been abandoned by the tenant nor surrendered by him to the plaintiff.

The facts and circumstances are such that different minds will come to different conclusions on the question of occupancy, and that makes it a very proper case for a jury. It does not follow that because there is no contradictory testimony the court must take the question from the jury and determine it as one of law; on the contrary, if different results would be reached by different minds, the question must go to the jury.

The appeal book presents no error and the judgment must be affirmed, with costs.

GILBERT, J., dissenting, BARNARD, P. J., not sitting.

Judgment and order denying new trial affirmed, with costs.



JACOB CRAWFORD AND THOMAS D. PENFIELD, RESPONDENTS, v. C. BECKER, IMPLEADED WITH P. J. SHERWOOD, APPELLANT.

*Building contract—right of owner to complete work—effect of so doing upon damages for delay.*

A building contract contained a clause authorizing the owner, upon the failure of the contractor to proceed with the work, to notify him that unless he did so proceed he should himself complete it and charge the contractor with the expense of so doing, and another clause providing that for each and every day's delay in completing the building after a date therein specified the contractor should pay the sum of five dollars as and for liquidated damages. The owner, in pursuance of the first clause, notified the contractor and completed the building himself.

*Held*, that he had thereby waived his right to claim the damages provided for in the contract, for a failure to complete the building by the specified time.\*

APPEAL by defendant Becker from a judgment entered upon the verdict of a jury, and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The action was brought to foreclose a mechanic's lien. The only question in the case arose upon the effect of two clauses contained in a contract for the erection of a house entered into between the defendant Becker, the owner of the land, and the defendant Sherwood. The clauses were as follows:

"*Sixth*. Should the contractor, at any time, during the progress of the said works, refuse or neglect to supply a sufficiency of materials or of workmen, or cause any unreasonable neglect or suspension of the work, or fail or refuse to comply with any of the articles of agreement, the owner or his agent shall have the right and power to enter upon and take possession of the premises, and provide materials and workmen sufficient to finish the said works, after giving four days' notice in writing, and the expense of the same shall be deducted from the amount of the contract.

"*Tenth*. Should the contractor fail to finish the work at or before the time agreed upon, he shall pay to the party of the first part the

\* See *Murphy v. Bucknam*, 66 N. Y., 297-300.—[REF.]

sum of five dollars for each and every day thereafter the said work shall remain unfinished, as and for liquidated damages."

*W. P. Prentice*, for the appellant.

*Martin J. Keogh*, for the respondent.

DYKMAN, J.:

This is an action to foreclose a mechanic's lien. The plaintiff furnished material to the contractor for the erection of a building for the owner. The contractor continued work until he had received three installments, and there remained unpaid on his contract the sum of \$1,000. He abandoned the work on the 18th day of November, 1876, soon after he received the last payment, but he had then expended considerable sums of money in procuring articles to be used in the completion of the building, so that it only cost the owner \$485.40 to finish it after the contractor left off work. On the 24th day of November, 1876, the owner gave notice to the contractor, under a clause in the building contract authorizing him so to do, that unless the contractor proceeded with the work he should himself complete the building and charge him with the outlay necessary therefor; and the owner did so finish the building, at the expense mentioned above.

The building was thus completed, and there remained unexpended and unpaid of the contract price \$514.60. This money was then due and payable to the contractor. The plaintiffs filed their notice of lien on the second day of December, 1876, and that gave them the right to recover all that was then due to the contractor and that became due thereafter. They have recovered the balance of the \$1,000 which remained unexpended after the completion of the building; and so far there is no difficulty in sustaining the recovery.

Another point is raised by the appellant, which was ruled against him on the trial. The written contract between the contractor and owner for the erection of the building fixed the first day of November, 1876, as the time for the completion of the building, and in relation thereto stipulated, that should the contractor fail to finish the work at or before the time agreed upon, he should pay to the

owner the sum of five dollars for each and every day thereafter the said work should remain unfinished, as and for liquidated damages. Assuming that the sum of five dollars a day is to be considered as liquidated damages and not as a penalty, it was inserted in the contract for the indemnity of the owner against the damage he might sustain by reason of the failure of the contractor to finish the building at the time mentioned. He might have relied upon this for his security and left the building incomplete. Instead of doing that he proceeded under the other provision of the contract and finished the building. We think, therefore, he must be held to have waived the penalty which was imposed for the failure to complete the building in time.

We have thus examined the two questions which control the case, and we think, upon the whole, the judgment should be affirmed, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment and order denying new trial affirmed, with costs.

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CATHARINE L. WING, PLAINTIFF, v. IRENE E. SCHRAMM,  
DEFENDANT.

*Chap. 90 of 1860 — conveyance by married woman under — assent of husband to — effect of failure of.*

Under section 8 of chapter 90 of 1860, providing that "any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same; but no such conveyance or contract shall be valid *without the assent in writing of her husband*", a conveyance by a married woman of her real estate was good as against all the world but her husband.

The assent of the husband need not be given prior to, or at the time of the delivery of the deed, but may be subsequent thereto.

MOTION for a new trial on a case and exceptions.

This was an action of ejectment brought to recover possession of certain real estate in the city of Brooklyn, with damages for the withholding of the possession of the same. The action was tried

before the court without a jury. The justice before whom the action was tried found that the plaintiff was the wife of Edmund Yenni from June 19, 1856, to October 7, 1862, when the plaintiff obtained a decree of absolute divorce from the said Edmund Yenni; that the plaintiff became seized of the premises in the complaint mentioned, under and by virtue of a deed made to her as grantee therein, subject to a certain mortgage for \$3,500 and interest, the amount of which said mortgage formed part of the consideration money therefor, and the payment whereof was assumed by her; that the balance of said consideration money expressed in said last-mentioned deed was paid by plaintiff's said husband, Edmund Yenni.

On or about September 5, 1861, the plaintiff executed and delivered to one Antoinette Yenni the deed of said premises, set forth and as alleged in defendant's answer herein. The said deed was drawn and its execution procured, and the same was delivered to the grantee therein named by the plaintiff's said husband, Edmund Yenni, and the grantee therein named took possession of said premises thereunder.

After the said decree of divorce, the plaintiff's said husband, Edmund Yenni, at the request of the grantee therein named, who was then in possession of said premises, indorsed upon the said deed, and executed and delivered to said grantee a writing in the words and figures following: "I hereby consent to the within conveyance and approve of the same. New York, September 12, 1861. E. YENNI." (Seal.)

The consideration expressed in said last-mentioned deed, to wit: \$6,000, was made up and paid by the assumption of mortgages and other charges upon the property, and by the payment of \$500 in cash, whereof the plaintiff herself received \$300 and her said husband the balance, which was by him applied to the support and maintenance of his said wife.

Afterwards, said Antoinette Yenni paid and discharged the said mortgage for \$3,500, and all arrears of interest thereon, and also all taxes then due and owing upon said premises at the time of said conveyance. Afterwards said Antoinette Yenni died, leaving her last will and testament, which was duly admitted to probate, and the executor thereof, under and by virtue of the power thereby conferred upon him, for a good and valuable consideration by him received, con-

veyed the said premises to defendant by the deed mentioned and alleged in the answer herein, and the defendant received the same in good faith, and without notice or knowledge that said consent had been in fact indorsed upon said deed of September 5, 1861, subsequent to said divorce.

The defendant took possession of said premises upon the delivery of said deed to her, and since then has used and occupied the same, has made improvements, betterments and additions thereto, and has also paid the taxes, insurance, interest and repairs thereon.

As conclusions of law, the justice found, "that said deed of September 5, 1861, is not valid, and the plaintiff is not bound thereby, because the same was without the consent in writing of her said husband while he was her husband; that by reason of the premises the defendant has the rights of a mortgagee in possession, and as such is entitled to receive repayment of the amounts so advanced, allowed and paid by her said grantor, as the consideration for the conveyance to her of said premises as aforesaid, over and above the liens thereon at the time said conveyance by plaintiff was made, and all amounts subsequently paid by her or the defendant for like purposes, or for improvements, betterments, additions to, and assessments upon said premises, with interest upon the several items of the same, and upon payment thereof the plaintiff will be entitled to the possession of said premises."

*C. E. Tracy*, for the plaintiff.

*G. N. Reynolds* and *Nehemiah Millard*, for the defendant.

DYKMAN, J. :

On the 15th day of April, 1857, the plaintiff was the wife of Edmund Yenni, and on that day he caused the premises in question to be conveyed to her. He paid all of the purchase-money that was paid, and she paid nothing. On the 5th day of September, 1861, the plaintiff, at the request of her husband, executed and delivered to his mother, Antoinette Yenni, a full covenant warranty deed of the premises, and the grantee took possession. At that time section 3 of chapter 90 of the Laws of 1860 was in force and had not been amended, and it reads as follows: "Any married

woman, possessed of real estate as her separate property, may bargain, sell and convey such property, and enter into any contract in reference to the same, but no such conveyance or contract shall be valid without the assent, in writing, of her husband, except as hereinafter provided." This section was amended by chapter 172 of the Laws of 1862, by leaving out that part which required the husband's assent.

The husband of the plaintiff did not make a written consent to her conveyance to her mother until after she obtained an absolute divorce against him in October, 1862, and then he made the following indorsement on the deed :

" I hereby consent to the within conveyance and approve of the same.

NEW YORK, *September* 12, 1861.

E. YENNI." [SEAL.]

The grantee in this conveyance died seized of the premises, and left a last will and testament, which contained a power of sale, and under that her executor conveyed the premises to the defendant, for value, in January, 1873. The consent of the plaintiff's husband was then indorsed on her deed, and the defendant had no notice of any defect or irregularity. The defendant, therefore, is a *bona fide* purchaser.

If under this state of facts the plaintiff can recover these premises, then the law of 1860 will have worked a result which shows that it was not amended any too soon. She never had any equity in the premises. She never paid a dollar on the purchase-money, and she made her full covenant warranty deed and suffered it to be spread upon the records, and then laid by until the defendant became the purchaser for full value, without sounding any note of alarm, or asserting any right.

Now, what is meant by the provision in section 3 of the Law of 1860? That no conveyance of a married woman shall be valid without the assent, in writing, of her husband. One thing intended was to give the husband some control over the alienation of his wife's land, and it is very reasonable to suppose that that was the only aim and intention of the section. To provide that the con-

veyance should not be valid against him and his marital rights without his assent in writing. If this is the true construction, then the grantee in such conveyance took a title valid against the world, except the husband, and all that was necessary was the written assent of the husband to the conveyance.

When the plaintiff executed her conveyance for these premises it was valid as against her, and it only remained for her husband to signify his assent to the same in writing to render it valid and effectual in every respect. He did assent to it in writing about a year after it was given. No time is specified within which such assent shall be made, and the most that can be claimed for the plaintiff is, that until it was given she could have revoked her deed. She did not, however, make the revocation, and the assent was given. The demands of the statute were complied with, and it matters not that the assent was given after the delivery of the deed.

An objection against the validity of the husband's assent is raised on the ground that he made it after his wife had obtained against him an absolute divorce; but if this provision was enacted for his benefit, to enable him to restrain her in the conveyance of her property, then he had the power and the right to make the assent after the divorce. He was the only person who could give such assent, and it was in the interest of justice that it should be given.

We think a new trial should be granted, with costs to abide the event.

BARNARD, P. J., concurred; GILBERT, J., not sitting.

Judgment reversed and new trial granted, costs to abide event.

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AARON A. DEGRAUW, PLAINTIFF, v. THE BOARD OF  
SUPERVISORS OF QUEENS COUNTY, DEFENDANT.

*Liability of county, for negligence of county treasurer.*

In the year 1875 the plaintiff purchased certain lots of land in the town of Jamaica at a sale, for non-payment of taxes, held by the county treasurer of Queens county, in pursuance of chapter 135 of 1873, and received certificates therefor. The county treasurer failed to serve the notices of redemption upon the owners and mortgagees, as required by the act. After the time for redemp-

tion had expired, the plaintiff, his certificates not having been redeemed, tendered them back to the county treasurer and demanded his money, on the ground that the failure of the county treasurer to serve the notices rendered the certificates void.

In an action by him to recover said amount from the county, *held*, that the county was not liable for any loss or damage which might have occurred by reason of the default or negligence of the county treasurer in the discharge of the duties of his office.

That the relation of master and servant did not exist between the county and its county treasurer.

That in conducting the said sale the county treasurer was not in any sense acting on behalf of the county, but was simply discharging certain duties in relation to the unpaid taxes of the town of Jamaica, imposed upon him by the law under which the sale was had.

CONTROVERSY submitted upon an agreed statement of facts.

On the 12th day of April, 1875, George W. Bergen, as county treasurer of Queens county, sold to the plaintiff, for non-payment of taxes, a number of lots, pieces or parcels of land, in the town of Jamaica and county of Queens, and delivered to the plaintiff a certificate signed by said county treasurer for each lot or parcel purchased by him; the county treasurer did not serve or cause to be served either personally or by publication upon the owner or mortgagee of the lands and premises so sold to said Aaron A. DeGrauw any notice of the sale, as required by the terms of chapter 135 of the Laws of 1873, and the acts amendatory thereof, nor were any such notices served at least six months previous to the expiration of fifteen months from the days of sale, as above stated, nor has he caused proof of such service, or of any alleged service of notice to be filed with the clerk of Queens county. None of the lands have been redeemed from the sales made as above stated, and the plaintiff is now the owner and holder of the several certificates of sale heretofore issued and delivered to him by said George W. Bergen, county treasurer as aforesaid. Said Aaron A. DeGrauw has demanded from the defendants the payment and return to him of the sum of money specified in each of the said certificates as paid by him, with the interest on the several sums stated from the times respectively above mentioned, and has also tendered and offered, and now tenders and offers, to surrender or cancel the said certificates upon being paid the sum therein stated, with interest as aforesaid.

The questions submitted to this court upon the case were as follows :



1. Under the statute under which the premises were sold, is the county treasurer required to serve notice upon the owner or mortgagee of the lands and premises sold, and within what time must such notices be served? This notice not having been served, will a service under chapter 361 of 1877 cure the defect and entitle the purchaser to a lease if the premises are not redeemed within the time specified in that act?

2. If such notices have not been served at least six months prior to the expiration of fifteen months from the day of sale, and the omission cannot be cured by the act of 1877, is the defendant liable for the neglect or default of the treasurer in not serving said notices upon the owner and mortgagees of the premises sold?

3. If the defendant is liable for such neglect or omission, to what extent is the plaintiff entitled to recover?

*John J. Armstrong*, for the plaintiff.

*Wm. H. Onderdonk*, for the defendant.

DYKMAN, J.:

In the view we take of this case it will not be necessary to determine when the notice required by section 17 of chapter 135 of the Laws of 1873, to be served on the owners and mortgagees of the lands sold, must be served by the county treasurer, nor whether the fact being that no such notice was given, the difficulty can be obviated by a service under the provisions of chapter 361, of the Laws of 1877. We might possibly get over the troubles arising from the neglect to serve the notice by giving these two acts their most extensive sense, but it would only be to reach another obstacle which seems to be insurmountable, and which we will proceed directly to examine without deciding the two questions above referred to.

Besides being political divisions the several counties in this State, are bodies corporate and have capacity to sue and be sued in the manner prescribed by law, and when any controversy or cause of action exists between a county and an individual, the same proceedings must be had for the purpose of trying the same as in other suits between individuals and corporations, and in all such suits the county

must sue and be sued in the name of the board of supervisors, except where county officers shall be authorized by law to sue in their name of office for the benefit of the county. (1 R. S., 364, § 1; p. 384, §§ 1, 2.)

Each county has a county treasurer who is its sole financial officer, and whose powers and duties are specially defined by statute, but who is in no sense the agent of the county. He is elected the same as all other county and town officers to assist in carrying on the local machinery of the State government, and has assigned to him by law certain independent powers and duties. For his conduct as such officer he is amenable to the laws of the land and the judgment of his countrymen, but we have been referred to no case where a county has been held responsible either for the misfeasance or malfeasance of its county treasurer, and after an extended search we have been unable to find one. It is true the county treasurer stands as the financial agent of his county. He receives the money belonging to it and pays the same out upon proper order, and the receipt of money belonging to the county by its treasurer is a receipt by the county, and an action can be maintained against a county for the recovery of money illegally collected and paid to its treasurer. (*Newman v. Supervisors of Livingston*, 45 N. Y., 676.) In that case a tax had been illegally levied and collected against the plaintiff and paid into the treasury of the county. The action was not brought to recover for the misfeasance of any of the officers either town or county, by whose instrumentality the wrong had been perpetrated, but it was brought for the recovery of money in the possession of the defendant which did not belong to it, and did belong to the plaintiff, and the action was maintained on that ground alone.

*Chapman v. The City of Brooklyn* (40 N. Y., 372) went upon substantially the same ground, and is no authority for the plaintiff. These cases only show that municipal corporations are not exempt from the liability which attaches to all corporations as well as to individuals, to refund money inequitably received.

A very different question is presented, however, when it is sought to make either an individual or a corporation liable for the wrongful or negligent acts of a third person, for before that can be done the relation of master and servant between the party sought to be held

liable, and the *tort feasor* must first be established. This cannot be done between a county and its county treasurer.

In the case of *Lorillard v. The Town of Monroe* (11 N. Y., 392) it was sought to hold the town responsible for a mistake of the assessors in erroneously assessing property of the plaintiff, and then compelling him to pay an illegal tax, and the Court of Appeals there held that the assessors and collector were not in any legal sense the agents of the town in its corporate capacity, and that the town was not responsible for any mistake or misfeasance committed by them in the performance of their duty. There is no reason why the same rule should not be applied to county officers. Nobody ever supposed that a county could be held responsible for the misfeasance of a sheriff, or a county clerk or register, and yet there is as much reason why it should be liable for their negligence as for that of a county treasurer.

Neither can this action be maintained, on the ground that the money received from the plaintiff by the county treasurer was received in his official capacity as the funds of the county, and so received by the county itself, for, by the statute under which the sales were made and the money received, the county treasurer is required to pay all the money received on the sales for unpaid taxes to the town of Jamaica. In fact, the whole act relates to that town only, and the county of Queens could not receive any of the money paid to the plaintiff, and there is no claim that it ever has.

Moreover, in making the sales to the plaintiff and receiving the money therefor, the county treasurer did not act in behalf of his county in any sense. The legislature selected him as a proper person to perform certain acts in relation to the unpaid taxes in the town of Jamaica, and devolved certain duties upon him in that respect, but they have no relation to his official position. True, he is designated by his official title, but only as any other official, selected as he was, would have been. It would have been perfectly competent for the legislature to clothe any county or town officer or private individual with the same powers that were given to the county treasurer. Then there would have been no suggestion of any liability of the county for the acts of such person, and yet the claim for liability now has no better foundation.

The plaintiff places reliance upon two provisions of the Revised Statutes which are as follows :

First. "All losses which may be sustained by the default of the collector of any town or ward shall be chargeable on such town or ward. All losses which may be sustained by the default of the treasurer of any county in the discharge of the duties imposed by this chapter shall be chargeable on such county, and the several boards of supervisors shall add such losses to the next year taxes of such town or county." (1 R. S. [6th ed.], 985, § 5.)

Next, "All losses which may be sustained, and any deficiencies which may exist by reason of the default of the collector of any town or ward, shall be chargeable on such town or ward. All losses which may be sustained and any deficiencies which may exist by the default of the treasurer of any county in the discharge of the duties imposed by law shall be chargeable to such county ;" the remainder of the section provides that if any judgment shall be obtained against such treasurer for any deficiency on account of the State tax, the execution returned unsatisfied shall be conclusive evidence of such deficiency, and it shall thereupon become a county charge and be added to the next year's taxes. (1 R. S. [6th ed.], 960, § 69.)

It is entirely clear that these two sections have reference only to the accounts of the collector and the county treasurer and to defaults made by those officers in relation to these accounts, and were intended to provide that all deficiencies occasioned by such defaults were to be charged on and not to their respective towns and counties and the amounts thereof included in the tax levy for the next year. It certainly was not intended by these two statutes to enlarge the liability of either town or county for the acts of their officer.

Our conclusion is that the plaintiff cannot recover in this action, and that the defendant must have judgment, with costs.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment for defendants upon submitted case, with costs.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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AMOS M. RYERSON, RESPONDENT, *v.* JOHN KAUFFIELD,  
APPELLANT.

*Conversion — demand — when it must be proved.*

APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury and from an order denying a motion for a new trial, made upon the minutes of the justice before whom the action was tried.

The only question raised upon the appeal related to the second cause of action set forth in the complaint, which alleged that, by a contract entered into between the plaintiff and defendant, it was further understood and agreed by and between them, that the plaintiff should send to the defendant, in his (the said plaintiff's) cans the milk sold and to be delivered under and by virtue of said contract, as hereinbefore set forth, and that the defendant should return to the plaintiff all cans so sent to and received by said defendant; that, in accordance with such agreement, the plaintiff from time to time, sent a large number of cans to the defendant, containing the milk sent to and received by him as hereinbefore set forth; that the defendant received such cans containing such milk as aforesaid, and in violation of the said contract, neglected and still neglects to return a large number of such cans so received by him as aforesaid, to wit, the number of twenty cans, and that by reason of the facts and circumstances last aforesaid, the plaintiff has suffered loss and damage from the defendant in the further sum of sixty dollars. The question was, whether the facts so set forth showed a conversion of the cans.

With reference to this the court at General Term said :

"There was no conversion of the milk cans established upon the trial. The defendant received the cans from the plaintiff under an agreement that he would return them to the plaintiff, and he has neglected so to do. There has been no demand made for their return. The possession of the defendant was lawful, and until he was guilty of some tortious act in reference to the property there was no conversion. (*Hall v. Robinson*, 2 N. Y., 293; *Jessop v. Miller*, 1 Keyes, 321.) Mere omission is not conversion or equivalent to a conversion. (*Hawkins v. Hoffman*, 6 Hill, 588; *Scovill v. Griffith*, 12 N. Y., 509.)"

The judgment should be reversed and a new trial granted, costs to abide event.

*Richard L. Sweezy*, for the appellant. *Bacon & Duryea*, for the respondent.

Opinion by BARNARD, P. J. ; GILBERT, J., concurred ; DYKMAN, J., not sitting.

Judgment and order denying new trial reversed, and new trial granted, costs to abide event.

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THOMAS C. VAN BRUNT, RESPONDENT, v. JOHN AHEARN,  
IMPLEADED, ETC., APPELLANT.

*Complaint — alleging obstruction of highway — Public nuisance — when an action to abate, is maintainable.*

APPEAL from an order overruling a demurrer to the complaint.

The complaint in this action alleges that the plaintiff is the owner of certain land fronting on a certain way, road or street, known as Catharine street. In one portion of the complaint the plaintiff states that he is entitled to a right of way through Catharine street, as an easement, and in another part he states substantially that Catharine street is a public highway. The plaintiff further states that his only means of access to his land is through Catharine street. It is then charged that the defendant, with another person, have wrongfully dug up this street and erected upon it a building, and placed across it a

fence, so as to prevent all passing over it by the plaintiff, and that damage has resulted to the plaintiff by these wrongful acts; that the defendants continue the obstruction and refuse to remove them, and that since the erection of these structures he has been deprived of the use of this street. The relief demanded is that Catharine street be restored to its previous condition; that the defendant be enjoined from further interfering with the plaintiff's rights therein, and that the plaintiff recover the damages sustained.

A demurrer to this complaint was interposed on the grounds following:

*First.* That there is a defect of parties defendant.

*Second.* That several causes of action have been improperly united.

*Third.* That the complaint does not state facts sufficient to constitute a cause of action.

After disposing of the two first grounds of the demurrer, with reference to the third cause, the court at General Term said:

"The complaint does state facts sufficient to constitute a cause of action. It alleges that the plaintiff is the owner of land fronting on Catharine street, and that his only public entrance to the said land and his only mode of access thereto was through that street; that he has a private right of way as an easement over the said street to his lands, and also that it is a public highway, and that the defendants have fenced up the street and continued the obstructions so that the plaintiff cannot reach his land through the same. If the plaintiff has a right of way over the street, then, although the obstructions are not a public nuisance, yet the plaintiff has the right to have it abated and to invoke the aid of the court to cause its removal. (*Drake v. Rogers*, 3 Hill, 604.)

If the street is a public highway, then the obstacles are a public nuisance, and the plaintiff may maintain this action for its abatement, having alleged special damages peculiar to himself. (*Delaney v. Blizzard*, 7 Hun, 7; *Knox v. Mayor*, 55 Barb., 404.)

The defendant's counsel seem to regard this as an action for the abatement of a nuisance similar to the common-law action for that purpose, and that it was necessary to allege that the plaintiffs were the owners of the freehold affected by the nuisance at the time the acts complained of were committed, and that the defendants were

the owners of the land whereon the nuisance was erected. In this the counsel is in error. As has been already stated, it is an action in equity, and the court can administer relief in this class of cases on broad principles of justice, without reference to technicalities which prevailed formerly on this subject in courts of law. (*Knox v. Mayor, supra.*)”

*Frank Crooke*, for the appellant. *Alfred B. Cruikshank*, for the respondent.

Opinion by DYKMAN, J.; BARNARD, P. J., concurred; GILBERT, J., not sitting.

Order overruling demurrer to complaint affirmed, with costs and disbursements.

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MARGARET S. WOODBRIDGE, APPELLANT, v. PELEG NELSON, RESPONDENT.

*Conversion of property — what evidence sufficient to establish — order of arrest for.*

APPEAL from an order made at the Special Term, setting aside an order of arrest.

The court, at General Term, said: “The facts so far as they are material for the discussion of the present appeal are few. On the 27th of January, 1877, the plaintiff owned certain household furniture which she had in her possession in the house, 24 Nassau street, Brooklyn. On that day she sold the furniture to defendant, and took in part payment for the same a note of \$250, accompanied by a chattel mortgage. The note was payable at six months, and the mortgage was filed in the proper office. It was designed and intended that the furniture should remain in the house 24 Nassau street, until after the note was paid. The defendant without plaintiff's knowledge, moved three times before the note was due. The plaintiff, in the last days of July, 1877, found him occupying rooms in Hicks street; he had not taken the furniture there. The plaintiff called there on the 30th of July, 1877, the last day of grace upon the note, and was told by defendant's wife that he was in Boston. Defendant's wife also told plaintiff at this interview that



she did not know where the furniture was. Plaintiff called twice at the same place in Hicks street, on the 4th. of August, 1877. Neither time was she able to find defendant. On one of these occasions defendant's wife told her that her husband had gone to Boston and would return the tenth or eleventh of August; that she did not know where the furniture was. After being pressed by plaintiff, she said it was stored in Myrtle avenue, but she didn't know where. On the tenth of August plaintiff again called at Hicks street and defendant and his wife had both moved away the day before. Plaintiff is unable to find her property or any property of defendant and is unable to find defendant, nor that he has any known residence. By the default in the payment of the mortgage the title became absolute in plaintiff. No demand is necessary if the property has been converted by defendant. The only question upon this appeal is, whether these facts would entitle the plaintiff to go to a jury upon the question of conversion if the facts remain uncontradicted upon the trial. I think they would. I think the jury would, without hesitation, find a conversion in fact.

The order should be reversed with costs, and the motion denied with costs."

*Samuel W. Judson*, for the appellant. *John Cummins*, for the respondent.

Opinion by BARNARD, P. J.; GILBERT and DYKMAN, JJ., concurred.

Order vacating order of arrest reversed, with costs and disbursements.

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f48ac958CHARLES T. HARVEY, RESPONDENT, v. THE WEST-SIDE  
ELEVATED (PATENTED) RAILWAY COMPANY,  
APPELLANT.

*Account stated—authority of officer of corporation to make—Account rendered—  
what necessary to constitute it an account stated.*

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

The action was brought to recover the amount due upon an account stated. The plaintiff, while vice-president of the corporation defendant asked Mr. Taylor, who was the book-keeper of the corporation, and who also performed the duties of secretary and assistant treasurer thereof, for a copy of his account on the books of the corporation. Thereupon Mr. Taylor gave him a transcript of his account on the ledger. This action is founded solely upon that transcript, which the plaintiff claims is an account stated. The referee sustained such claim and rendered judgment for the plaintiff for the amount which appeared by said transcript to be due him with interest.

The court, at General Term, said: "We think the referee erred. No evidence was given which shows that Mr. Taylor was authorized to render an account to the plaintiff, which should be conclusive on the defendant. Without such authority an account rendered by him would not become binding on the corporation by the acquiescence of the plaintiff. Even if such an authority might be implied from the general duties of a treasurer or assistant treasurer, when such officer had rendered an account to a debtor of the corporation, it by no means follows that actual authority need not be shown when the legal effect of the act would be to liquidate or establish unsettled demands against the corporation. An officer who does not possess the power to create a debt against the corporation directly, cannot do it indirectly by sending an account which shows a balance due to the person to whom it is sent.

In this case, however, Mr. Taylor did not assume to exercise such a power. He sent no account to be acquiesced in or rejected by the plaintiff. His attention was not called to the question whether the account was full or accurate or not. In short, he merely complied

with the plaintiff's request without any intention of binding the corporation. An essential element of an account stated, therefore, is wanting, namely, that it was rendered for the purpose of asserting a claim, or at least of establishing the balance due thereby.

Upon these grounds, namely (1), that no authority in Mr. Taylor to bind the corporation by means of an account stated, was shown; and (2), that Mr. Taylor did not intend or assume to exercise such a power. We think the judgment should be reversed and a new trial granted at the Circuit, with costs to abide the event."

*Dudley Field*, for the appellant. *J. S. Millard*, for the respondent.

Opinion by GILBERT, J.

Present — BARNARD, P. J., GILBERT and DYKMAN, JJ.

Judgment reversed, with costs to abide event, and new trial granted at Circuit.

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ANNIE JENNINGS, RESPONDENT, v. STRATFORD P. DAVIDSON AND CATHARINE O. DAVIDSON, HIS WIFE, APPELLANTS.

*Action for malicious prosecution — malice — inference as to.*

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APPEAL from a judgment in favor of the plaintiff, entered upon the verdict of a jury, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried. The action was brought to recover damages for malicious prosecution.

Upon the appeal the court at General Term said: "The plaintiff, to maintain her action, was bound to prove both want of probable cause and malice. Malice may be inferred from the want of probable cause. The court erred in charging the jury that 'the law infers malice when there is a want of probable cause.' The jury might infer it, but it is not an absolute inference of law. The court refused to charge the proposition 'that when there is want of probable cause, malice *may* be inferred,' saying 'the jury are bound to infer it.' This was also erroneous. (*Heyne v. Blair*, 62 N. Y., 19.)

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Upon the whole case, I think there was abundant proof of probable cause. It is not necessary, however, to decide this question upon this appeal. A new trial may be supported by other evidence."

*J. Warren Lawton*, for the appellants. *Martin J. Keogh*, for the respondent.

Opinion by BARNARD, P. J.; GILBERT and DYKMAN, JJ., concurred.

Judgment and order denying new trial reversed and new trial granted, with costs to abide event.

# Cases

DETERMINED IN THE

## FIRST DEPARTMENT

AT

GENERAL TERM,

March, 1878.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
BENJAMIN K. PHELPS *v.* THE COURT OF GENERAL  
SESSIONS OF THE COUNTY OF NEW YORK,  
RESPONDENT.

*A civil justice in New York — not an officer or employe of the city government under §. 95 of chap. 835 of 1873 — Indictment for obtaining money by false pretenses — what must be alleged in.*

A civil justice of one of the District Courts in the city of New York is not "an officer of the city government or a person employed in its service" within the meaning of section 95 of chapter 835 of 1873.

An indictment alleging that the defendant, with intent feloniously to cheat and defraud the city of New York, and to get into his possession a certain sum of money belonging to said city, knowingly made certain false and fraudulent representations to an officer thereof whereby the latter was induced to pay the said money to a third person, but which does not allege that the defendant received the money or any portion thereof, either alone or in conjunction with others, is bad and should be quashed.

*Quare*, whether, if the indictment charged that the person who made the false pretenses obtained the money, it would be sufficient upon the trial to show that some other person actually received it.

Where it is claimed that there is a misjoinder of counts in an indictment because the first count charges a misdemeanor only, and the second count a felony, the proper remedy is to put the district attorney to his election, or to ask the court to give proper instructions to the jury as to their verdict; such misjoinder does not entitle the defendant to have the indictment quashed, except in the discretion of the court.

CERTIORARI, brought by the district attorney, to review the judgment and decision of the Court of General Sessions, quashing an indictment theretofore found in that court against one John Flanigan.

Flanigan, it was charged, while a civil justice of the Tenth Judicial Court of the city of New York falsely certified upon the pay roll of his court to the comptroller of the city, upon the forms provided by him for that purpose, that one Benjamin F. Haskin had rendered services as a stenographer to said court and was entitled to pay therefor, when in fact the said Haskin was not a stenographer and had never rendered any service as such.

Upon these allegations Flanigan was indicted. The indictment contained three counts: First count charged that, by reason of the premises substantially above set forth, "Flanigan, justice, as aforesaid, and being a person holding a public trust, office and employment in said city and county of New York, etc., unlawfully, knowingly and corruptly did willfully neglect to perform the duty imposed upon him by law as such justice," viz., "to correctly state and certify to the said corporation the services rendered in said court by the several persons attached thereto," etc. Second count charges the same facts as being an abuse of powers. Third count charges the same facts, as the obtaining of money from the corporation by false pretenses.

The motion to quash was based on the following grounds: 1st. That there is a misjoinder in uniting the two first counts, which are for misdemeanor, with the third for false pretenses claimed to be a felony. 2d. That the two first counts cannot be maintained except upon the theory that Flanigan, as such district justice, was an officer of the corporation of the city of New York, within the meaning of chapter 335 of the Laws of 1873 (Session Laws of that year, p. 484), and especially of section 95 thereof (p. 509), and that he was not such officer. 3d. That the count for false pretenses cannot be maintained, inasmuch as the party who made the pretense does not appear to be the party who obtained the money.

The motion to quash was granted by the city judge upon the two latter grounds, no opinion being expressed by him on the question of joinder.

*B. K. Phelps*, for the plaintiff in error.

*William F. Kintzing* and *John Flanagan*, for the respondent. The third count in the indictment charging false pretenses is fatally defective in substance and is demurrable. The court properly quashed it. (3 Rev. Stat. [6th ed., Banks Bros.], 948, § 58; *Rex v. Garrett*, 1 Dears. C. C., 232; see Graves' Criminal Statute, 136; 3 Russell on Crime, 618, note *d* [4th ed.]; *Rex v. Wavel*, 1 Moody C. C., 224; *Rex v. Eagleton*, 1 Dears. C. C., 515; *Rex v. Wetchel*, 2 East P. C., 830.)

DAVIS, P. J. :

If it be conceded, that there is a misjoinder of counts in the indictment because the first count charged a misdemeanor only, and the second a felony, that fact would not entitle the defendant to have the indictment quashed; for two reasons:

1. The motion to quash is addressed to the discretion of the court, and its refusal, when based upon a misjoinder of counts, would not be error.

2. The proper remedy in such a case is, by motion at the trial, to require the prosecuting attorney to elect upon which count of the indictment he will proceed; or to ask the court to give proper instructions to the jury in relation to their verdict.

The first and second counts of the indictment were quashed on the ground that the defendant was not "an officer of the city government, or a person employed in its service." These counts were based on section 95 of the act of April 30, 1873. (Laws of 1873, chap. 335, pp. 484, 509.) Section 95 of that act declares that "any officer of the city government, or person employed in its service, who shall willfully violate or evade any of the provisions of this act, or commit any fraud upon the city \* \* \* shall be deemed guilty of a misdemeanor."

The defendant was a civil justice of the tenth judicial District Court of the city of New York. The question whether he, as such justice, was an officer of the city government or a person employed in its service, was disposed of by *Quin v. The Mayor* (44 How. Pr., 266), which was affirmed by this court and reaffirmed by the Court of Appeals (53 N. Y., 627), on the opinion given at Special Term, by FANCHER, J. It is there held that the District Courts formed part of the judicial sys-

tem of the State, and that their justices are not local officers of the city, within the meaning of section 97 of chapter 335 of the Laws of 1873. It seems necessarily to follow, that they are not officers within the meaning of section 95 of the same act.

The same question has been before the courts in respect to the clerks of the District Courts, and it was held both by this court and by the Court of Appeals, affirming the judgment of this court, that such clerks are not local officers of the city and county of New York, for the same reason that the justices of those courts are not such officers. (*Whitmore v. Mayor*, 5 Hun, 195; S. C., 67 N. Y., 21.) The same point was also adjudicated in the same way by the Superior Court of the city of New York. (*Landon v. Mayor*, 7 J. & S., 467.) The question can no longer be considered an open one; and the judgment of the Court of Sessions quashing the first and second counts of the indictment must, for that reason, be affirmed.

The question as to the third count of the indictment would seem by the opinion of the court below, to have been disposed of, in part at least, upon a concession of the district attorney, that the count could not be sustained, and an expression of his willingness that it should be quashed. But it is now insisted that this part of the opinion of the court below is the result of a misunderstanding; at all events, the same concession is not made here, but, on the contrary, it is urged that the indictment properly charges the crime of obtaining money by false pretenses, as defined by the statute. (3 R. S. [6th ed.], 948, § 58.)

The count charges in substance that the defendant, being a justice of the Tenth District Civil Court of the city of New York, with intent feloniously to cheat and defraud the mayor of said city of New York, and to obtain and get into his possession the sum of \$166.66, in money, of the proper moneys of the said corporation, did then and there feloniously, unlawfully, knowingly, and designedly, falsely pretend, represent, and upon the pay-roll of the said Tenth District Civil Court, for the month of September, 1874, certify in writing to the comptroller of the said city, that Benjamin F. Haskin, whose name appeared upon said pay-roll as stenographer of the Tenth District Court, had performed services in said court for the corporation aforesaid as such stenographer, from the



first to the thirtieth day of September, 1874, inclusive, as in the said pay-roll set forth; and that there was then due to him for such services, from the corporation aforesaid, the sum of \$166.60 in money. That the comptroller believing said false pretenses, representations and certificate in writing, so made as aforesaid by the said justice, and being deceived thereby, was induced by reason thereof to deliver and cause to be delivered and did then and there deliver and cause to be delivered to the said Benjamin F. Haskin a certain sum of money, to wit, the sum of \$166.66, in money; and the said Haskin did then and there designedly receive and obtain the said sum of money by means of the false pretenses, representations and certificate aforesaid, with intent on the part of both the said defendant and the said Haskin feloniously to cheat and defraud the said mayor, etc., of New York, of that sum.

It then avers that the said Haskin had not rendered services as stenographer during the time named in said pay-roll, and that the said mayor, etc., were not indebted to the said Haskin for services rendered as stenographer to said court, in the sum named or in any other sum, nor was the said Haskin entitled to demand, require or receive any sum of money whatever from the said mayor, etc., on account of services rendered or alleged to be rendered by him as such stenographer, as the said defendant at the time he made the aforesaid false pretenses, representation and certificate well knew.

And then follows the general conclusion, averring as the legal effect of the charge, that the said Haskin and said defendant, by means of the false pretenses, representations and certificate aforesaid, so made by the defendant, unlawfully, falsely, knowingly and designedly, did receive and obtain from the comptroller the sum of money aforesaid.

The charging part of the indictment does not allege that the money or any part thereof was obtained or received by the defendant; and the question presented to this court is whether it is sufficient to charge that by reason of an alleged false representation made by the defendant, the money or property of another has been obtained by a third person. The count would unquestionably be good if the charging part had alleged that the pretense was by the defendant, and the obtaining and receiving the money under the pretense was by Haskin *and the defendant*, for this would set out

a sufficient obtaining by the defendant. Where a false pretense is made by one party and moneys obtained thereon by two or more, it is enough to charge that the person who made the pretenses is one of the parties by whom the money or property was obtained. But it is not so clear that it is sufficient to allege that the defendant made the false pretenses upon which some other person obtained money.

As matter of pleading we think the indictment is bad, for it should be in form a charge that the person who made the pretenses obtained the money and property, even if it would be sufficient to show, on the trial, that some other person actually received it. There may be cases, perhaps, in which the courts would hold that under our statute of false pretenses it would be sufficient, in order to uphold the allegation, that the defendant who made the pretenses obtained the property, to show that it was delivered or received by some other person by reason of such false pretenses. But in such case the pleading should distinctly aver the obtaining to have been by the person prosecuted in and by the indictment. The charging part of this indictment does not allege that the defendant obtained or received any sum of money; on the contrary it avers that the defendant, as such justice, affixed his certificate to the pay-roll, upon which one Haskin obtained and received money from the city as his salary as stenographer when, in fact, he rendered no such service. And we do not think this defect is cured by the averment as to the legal effect of the facts charged, contained in the concluding portion of the indictment.

A similar question was before the courts under an English statute (Vict., 24, 25, cap. 96, § 88; *Reg. v. Garrett*, 1 Dears. C. O., 232), in which it was held in substance, that it must be shown under the statute that the property was obtained by the prisoner. MAULE, J., said: "The word 'obtain' means the same as the word 'get,' in its sense of 'acquire.'" PARKE, B., said: "The word 'obtain' seems to mean, not so much a defrauding, or depriving another of his property, as the obtaining of some benefit to the party." And in consequence of that decision a new statute was passed, covering a case where one party, by a false pretense, caused or procured money or property to be delivered to another person for his use or benefit, or for the use or benefit of any person, with

intent to defraud. (3 Russel on Crimes, 618, note *b*; Roscoe's Crim. Ev. [7th ed.], 473.)

We are of the opinion, therefore, that the third count of the indictment was also properly quashed, because its charging part did not contain any averment that the money was obtained by the defendant named in the indictment.

The order and judgment should, therefore, be affirmed.

BRADY and INGALLS, JJ., concurred.

Judgment and order affirmed.

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GEORGE OPDYKE AND OTHERS, PLAINTIFFS, v. GEORGE A. MERWIN AND OTHERS, DEFENDANTS.

*Usury — Contract — by what laws to be governed.*

W., a resident of Connecticut, drew, in that State, a draft upon the defendant, a resident of New York, directed to him at his place of business in New York, and the same was accepted by him, payable in New York, solely for the accommodation of the drawer and returned to W., in Connecticut, with the expectation that it would be negotiated in that State. W. discounted the draft in Connecticut at the rate of three per cent per month.

In an action upon the draft brought in this State, *held*, that as the draft had no existence as a contract until discounted in Connecticut, and as the acceptor understood that it was to be used in that State, the acceptance must be regarded as a Connecticut contract; that the question of usury and its effect upon the validity of the draft was to be governed by the laws of Connecticut and not by the laws of New York, and that the mere fact that the paper was payable in this State did not render it subject to our law as to usury.

MOTION for a new trial on exceptions ordered to be heard, in the first instance at the General Term, after a verdict directed by the court.

This action was brought by the plaintiffs, as owners and holders of two drafts drawn by John H. Wingfield of Connecticut upon, and accepted, payable in the city of New York, by the defendants, then residents of that city. The drafts were dated in New Haven and directed to the defendants at their place of business at No. 60 Duane street, New York. They were accepted for the accommodation of the maker and were returned to him with authority to use them in the State of Connecticut where they were discounted at the rate of three per cent per month.

*Miller, Peet & Opdyke*, for the plaintiffs. The production of the drafts by plaintiffs was presumptive proof that they were the legal owners, for value, in the usual course of business and before maturity, and conclusive proof of the same in the absence of proof of illegality or fraud in the inception of the drafts or that the drafts had been lost or stolen. (1 Dan. on Negotiable Inst., § 812; *Colins v. Gilbert*, 94 U. S., 753; *Ross v. Bedell*, 5 Duer, 462, 467; *Charles v. Marsden*, 1 Taunt., 224; *Grant v. Elliott*, 7 Wend., 229; *Com. Bank v. Norton*, 1 Hill, 501; *Harvey v. Towers*, 4 Ex. L. and Eq. R., 537; *Berry v. Alderman*, 24 id., 318; see, also, *Grocers' Bank v. Penfield*, 7 Hun, 279; affirmed by Court of Appeals, 2 Abb. [N. Cas.], 305; *Schepp v. Carpenter*, 51 N. Y., 602; *Mechs. and Trs. Bank v. Crow*, 60 id., 85.)

*Joseph N. Dickson*, for the defendants. On the trial no evidence of ownership was offered, except mere naked possession. This is not sufficient when the note has been shown to be of illegal inception or without consideration. (Edwards on Bills, \*686; *Stalker v. McDonald*, 6 Hill, 96; *Wardwell v. Howell*, 9 Wend., 170; *Vallet v. Parker*, 6 id., 615; *Bailey v. Bidwell*, 13 Mees. & Wels., 73; *Heath v. Sansom*, 2 Barn. & Adolp., 297.) The court erred in declining to direct a verdict in favor of defendants on the ground that the drafts were void for usury, and the plaintiffs could not maintain an action upon them against defendants. The place of performance of the contract in this case was New York. The place of acceptor's residence shall be the place of payment, unless otherwise stipulated. (*Freese ads. Brownell*, 10 Am. R., 239; Edwards on Bills, \*495.) In considering what is "the place of contract," with a view to determine what law governs it, the engagements of the maker and indorser of a note are to be treated as independent contracts. (*Lee v. Selleck*, 33 N. Y., 615.) As to the acceptor of a draft the law of the place where it is payable governs as to the question of legal interest and legality generally. It is the place of performance. (*Jewell v. Wright*, 30 N. Y., 259; *Cutler v. Wright*, 22 id., 480; *Everett v. Vendryes*, 19 id., 436; *Curtis v. Leavitt*, 15 id., 9, 227; Story on Conflict of Laws, §§ 282, 291.) When a note made and dated in this State is negotiated in another State at a rate of discount exceeding seven per cent the laws of New York control,

and no action can be maintained upon the note here. (*Jewell v. Wright*, 30 N. Y., 259; *Clayes v. Hooker*, 4 Hun, 231.)

DAVIS, P. J. :

A verdict was directed in this case at Circuit, and the exceptions were ordered to be heard in the first instance in this court.

One Winterfield, who resided at Stamford, in the State of Connecticut, made the drafts in suit in that State. They were drawn upon the defendants in this action, in the firm name of George A. Merwin & Co., at No. 160 Duane street, in the city of New York, which was their place of business. The defendants then resided in this city. The drawer forwarded the drafts to the defendants, who accepted the same in their firm name and returned them to him. The acceptance was purely for the accommodation of the drawer, and without any consideration between him and the acceptors. After receiving back the accepted drafts, the drawer forwarded them for discount to one Beach, a banker, at New Haven, Connecticut, by whom they were discounted, at the rate of three per cent per month, and the proceeds were used by the drawer in his business at New Haven. The drafts were afterwards indorsed by Beach to the plaintiffs, and on presentation for payment, payment was refused.

By the laws of Connecticut, which were proved on the trial, the rate of interest in that State is seven per cent a year, but the effect of receiving more, is the forfeiture of the "money or property so received to any person who shall sue therefor, within one year thereafter." The plaintiffs' counsel asked the court to direct a verdict for the plaintiffs, in accordance with the provisions of the statute of Connecticut. The court so directed, deducting the excess of interest over and above seven per cent, and to this direction the defendants excepted. The defendants' counsel moved to dismiss the complaint for want of proof of ownership of the drafts by the plaintiffs. He also moved, that the court direct a verdict for the defendants, on the ground that the rate of discount was usurious under the laws of this State and the acceptances were invalid. The court refused and the defendants duly excepted.

As to the exception of the defendants to the denial of the first motion to dismiss the complaint it is enough to say that the pro-

duction of the note, and the indorsement thereon by Beach to the plaintiffs, was *prima facie* evidence of ownership, and sufficient to entitle the plaintiffs to recover under the evidence in this case, unless the alleged defense of usury was established. (*Mechanics and Traders' National Bank v. Crow*, 60 N. Y., 85.)

As to the exception to the second motion of the defendant, unless the case is distinguishable from *Jewell v. Wright* (30 N. Y., 259) and *Clayes v. Hooker* (4 Hun, 231), it must be deemed to be disposed of by the case of *Dickinson v. Edwards*, decided at the present term of this court (post p. 405), holding the above cases to be *stare decisis* of the question therein involved.

But that case and this are not precisely analogous in their facts. In this case the drawer resided in Connecticut, he drew the drafts in that State; they were accepted in the State of New York by the defendants, solely for his accommodation, and returned to him, of course, with authority to use them in the State of Connecticut, and doubtless with the expectation that they would be so used. They were discounted in that State, and in that act each of them had its legal inception. Inasmuch as the acceptances had no legal existence as contracts until the delivery of them to Beach upon the discounting, and as such delivery must be held to be authorized by the acceptors, the acceptances must be regarded as contracts made in the State of Connecticut, notwithstanding the signatures of the defendants to the acceptances were given in New York. The drafts under the facts proved, were mere waste paper in the hands of the drawer until the delivery to Beach, and in legal effect the acceptances can only be considered a consummated contract by such delivery. The transaction of discount under the laws of Connecticut was a lawful one, so far as the validity of the paper is concerned, for the only effect of reserving more than seven per cent under those laws is a forfeiture of the excessive interest when sued for within a year. The acceptances were, however, payable at the place of business of the defendants in the city of New York, where alone they could lawfully be presented and payment demanded. But it has been held that the mere fact that paper is payable in this State which has been made and discounted in another State, at a rate of interest greater than is allowed by our statute, does not render it void by our laws if valid by the laws

FIRST DEPARTMENT, MARCH TERM, 1878.

of the State where it was made and discounted. (*Balme v. Wambough*, 38 Barb., 352; *Bank of Georgia v. Lewin*, 45 id., 340; *First National Bank v. Morris*, 1 Hun, 680, and cases there cited.) It must be conceded that these cases, impugn the general rule that contracts are to be governed by the law of the place where they are to be performed; but the severe consequences of usury have often been deemed a sufficient reason for making such exceptions. Under the authorities already cited, we feel ourselves justified in holding that the drafts in suit are contracts governed by the laws of Connecticut, and that the question of usury was properly disposed of by the court below; leaving it for the court of last resort to determine whether *Jewell v. Wright* disposes of the question adversely to this view.

The result is, that the plaintiffs are entitled to judgment upon the verdict, with costs.

Ordered accordingly.

INGALLS, J., concurred; BRADY, J., dissented.

Judgment ordered for the plaintiff on the verdict, with costs.

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EDWARD B. DICKINSON, RESPONDENT, v. WILLIAM Y. EDWARDS, APPELLANT.

*Usury — contract — by what law governed.*

The defendant signed and delivered at the city of New York a promissory note, dated at that place, whereby, three months from its date, he promised to pay to the order of B. & G. \$300 at the New York National Exchange Bank. The note was made solely for the accommodation of the payees. The note was sold in Boston, Massachusetts, by the payees at a rate of discount usurious under the laws of this State.

In an action by the plaintiff, to whom it had been transferred by the purchaser, *held*, that the question of usury was governed by the laws of this State and that the note was void.

*Jewell v. Wright* (30 N. Y., 259) followed.

APPEAL by defendant from an order made upon the minutes of the justice before whom the action was tried, setting aside a verdict and granting a new trial.

*E. P. Bellamy* and *W. S. Packer*, for the appellant.

*W. R. Beach*, for the respondent.

DAVIS, P. J. :

This action was brought upon a promissory note which is in words and figures following :

“\$300.

NEW YORK, *November* 14, 1874.

Three months after date, I promise to pay to the order of Messrs. Bailey and Gilbert, three hundred dollars at the New York National Exchange bank. Value received.

W. Y. EDWARDS.”

This note was written and signed by the maker and delivered to the payee above named at the city of New York. The jury found that it was purely an accommodation note without consideration as between the maker and the payees. The payees, Messrs. Bailey and Gilbert, indorsed and sold the note at Boston, in the State of Massachusetts, to one Pulcifer, who afterwards assigned it to the plaintiff. The note was sold at a rate of discount which would make it usurious and void by the laws of this State.

The jury, under a charge properly submitting the question in controversy between the parties, found a verdict for the defendant upon the defence of usury alleged in the answer, and the learned judge upon the motion for a new trial, based upon his minutes, granted the same, holding in substance that the note being accommodation paper had no legal inception until its sale and delivery in Boston, and must, therefore, be regarded as a contract made in Massachusetts, and in respect to the rate of interest not affected by the laws of the State of New York. This decision is in direct conflict with and necessarily overrules the decision of the Court of Appeals in *Jewell v. Wright* (30 N. Y., 259). That case was *in quatuor pedibus* in all material respects, with the present. In that case the promissory note of the defendant Wright, payable to the order of the defendant Dunlap, was signed and indorsed and delivered to the defendant Taylor, at Lockport in this State. It was payable at the Niagara County Bank at Lockport, one year



from its date, and was made and indorsed solely for the accommodation of Taylor. Taylor took it to Connecticut, where it was discounted, at the rate of twelve per cent, such discounting being its first negotiation. The Court of Appeals held that the note was governed by the laws of this State where it was made payable, and having been discounted at a greater rate than seven per cent, was void under our statutes against usury. The proposition that such a note is to be governed by the laws of the State where it was made payable, is sustained in *Jewell v. Wright*, by the citation of numerous authorities, among which were *Davis v. Garr* (2 Seld., 124), *Jacks v. Nichols* (1 Seld., 178), *Curtis v. Leavitt* (15 N. Y., 9), *Bowen v. Newell* (13 id., 290), *Everett v. Vendryes* (19 id., 436), *Cutler v. Wright* (22 id., 472), and *Jewell v. Wright* was followed by this court in *Hildreth v. Shepard* (65 Barb., 269).

The authority of *Jewell v. Wright* has been questioned, and may be said to have been seriously impaired by a number of cases since decided, in this and other courts. (*Bank of Georgia v. Lewin*, 45 Barb., 340; *Balme v. Wambough*, 38 Barb., 352; *Bowen v. Bradley*, 9 Abb., [N. S.] 395; *Tilden v. Blair*, 21 Wall., 241; *First National Bank v. Morris*, 1 Hun, 680.)

In the last of these cases, while DANIELS, J., criticised and doubted the correctness of the decision in *Jewell v. Wright*, he also said, still it may well be doubted whether a proper sense of decorum is consistent with the position that the decision in *Jewell v. Wright*, as long as it has not been overruled by the court pronouncing it, can properly be disregarded by this court. That case was determined, however, upon the question settled by *Rosa v. Butterfield* (33 N. Y., 665), to wit: that the sureties of a corporation can not defend an action on the ground of usury since by the statutes of this State the right to plead usury as a defense has been taken away from corporations.

*Jewell v. Wright* is followed in *Clayes v. Hooker* (4 Hun, 231), a case strongly analogous in its facts to the present.

Without entering into a discussion of the questions presented in the several cases above mentioned, it is enough to say that we feel constrained in this case, which is in all respects similar to that of *Jewell v. Wright*, to follow that decision, while it remains undisturbed by the court in which it was pronounced.

The order granting the new trial should be reversed, with costs, and with leave to the plaintiff to prosecute an appeal to the Court of Appeals.

BRADY and INGALLS, JJ., concurred.

Order granting new trial reversed, with costs, and with leave to the plaintiff to appeal to the Court of Appeals.

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124a	31
13	408
66	6
13	408
85	41
13	408
147a	601
13	408
151a	65

FRANCIS BROWN AND FRANCIS GORDON BROWN,  
APPELLANTS, v. JOSEPH W. SMITH, RESPONDENT.

JOHN D. WING AND ANOTHER, APPELLANTS, v. THE SAME,  
RESPONDENT.

PETER A. WELCH AND OTHERS, APPELLANTS, v. THE SAME,  
RESPONDENT.

*Manufacturers' act, chap. 40 of 1848, and chap. 333 of 1853 — certificate of payment of stock — must be sworn to — Issue of stock for property purchased — liability of holder to creditors.*

The certificate as to the payment of the capital stock of a manufacturing corporation, required to be filed by section 11 of chapter 40 of 1848, must be sworn to, and a mere acknowledgment is not a sufficient compliance with the provisions of the statute.

Where, in pursuance of section 10 of the said act, as amended by the act of 1853, stock has been issued to a person for the value of a manufactory and other property which has been purchased by the company, there being no fraud in the valuation of the property, he is not liable to the creditors of the company because of a failure on the part of the president and a majority of the trustees to file the certificate required by section 11 of the said act.

APPEALS from judgments in favor of the defendant, entered upon the report of a referee.

*Charles E. Tracy*, for the appellants.

*Freling H. Smith*, for the respondent.

DAVIS, P. J.:

The precise question upon which the learned referee disposed of this case in favor of the defendant was not presented or passed upon in any of the numerous authorities cited by the respective counsel. The actions were brought against the defendant, as a stockholder of a manufacturing corporation, organized under the general manufacturing act (chap. 40 of the Laws of 1848), as amended by chapter 333 of the Laws of 1853, to enforce a personal liability created by section 10 of the original act, on the ground that a certificate that the capital stock has been paid in, had not been made and recorded in the office of the county clerk, in accordance with the provisions of section 11 of the act.

A certificate was made by the president of the company and a majority of the trustees, certifying that the number of the shares of the capital stock of the company, was fixed at 1,400 of the par value of \$100 each, and that the full number of such shares had been issued by the company, for which \$30,000 had been paid in cash, and \$110,000 in real estate and machinery. The execution of the certificate was duly acknowledged by the president, and the trustees who subscribed the same, and it was recorded in the office of the proper county, but it was not sworn to by any of the officers as required by the eleventh section of the act.

The referee held that the certificate was fatally defective, because it was not sworn to. In this, we think he was right, because the statute plainly requires a verification *by oath*, and a mere acknowledgment is not a proper substitute for that requirement. The officers of the corporation might feel free to acknowledge such a certificate, and yet wholly unwilling to verify it by oath.

The amendatory act of 1853 is in *pari materia*, with the act of 1848, and both are to be read together to ascertain the intention of the legislature. Section 10 is to be read as though section 2 of the act of 1853, had originally formed a part of it. For this purpose it should read as follows:

“Section 10. All the stockholders of every company incorporated under this act, shall be severally, individually liable to the creditors of the company in which they are stockholders, to an amount equal to the amount of stock held by them respectively, for all debts and contracts made by such company, until the whole

amount of capital stock fixed and limited by such company shall have been paid in, and a certificate thereof shall have been made and recorded as prescribed in the following section : \* \* \* But the trustees of such company may purchase mines, manufactories, and other property necessary for their business, and issue stock to the amount of the value thereof, in payment therefor; and the stock so issued shall be declared and taken to be full stock, and not liable to any further calls; neither shall the holders thereof be liable for any further payments under the provisions of this section, but in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued for cash paid into the company, but shall be reported in this respect according to the fact."

The defendant in this case is the holder of stock to the amount of \$25,000; his shares were issued to and accepted by him, at the par value thereof, in part payment of a manufactory and other property necessary for the business of said company and purchased of him by the trustees for said company; his stock was issued and accepted as fully paid stock, and he never held or owned any other stock of said company. No question of fraud in the valuation of the property sold by him to the company is made, and it seems to be assumed, under the findings of the referee, to have been purchased at its fair value. The question presented, is whether such a stockholder is liable to the creditors of a corporation, under the provisions of the tenth section as amended, because the president and trustee failed to file the certificate in the form prescribed by the eleventh section of the act of 1848. The tenth section, as above read in connection with the amendment, provides that the stock issued in payment for the purchase of property to the amount of the value of such property, "shall be declared and taken to be full stock and not liable to any further calls, nor shall the holders thereof be liable for any further payments under the provisions of the tenth section." It seems clear that the holders of such stock when the same is issued in conformity to the said section, and taken as full stock, are exempted from two things: First. From liability to any further calls.

Second. From liability for any further payments under the provisions of the tenth section of said act.

It is obvious that the calls mentioned refer to future payments, as

provided for in the act, to make the stock issued, "full" or fully paid stock; payments of that kind are referred to in the last clause of section 10, which is in these words: "And the capital stock, so fixed and limited shall all be paid in, one-half thereof within one year and the other half thereof within two years from the incorporation of said company, or said corporation shall be dissolved." The words, "not liable for further calls," doubtless refer to this provision, and perhaps to assessments that might thereafter be made by the company for the purpose of making up deficiencies for losses of capital. But whatever was meant by this provision, it is clear that it has no relation to the personal liability to the creditors of the company.

It is impossible to find in the tenth section any thing to which the language, "neither shall the holders be liable for any further payments under the provisions of the tenth section," can apply unless it be the liability to pay to the creditors of the corporation an amount equal to the amount of the stock held by such stockholder. And unless that provision be held to exempt the holders of such stock, when issued fairly and without fraud for property purchased for which the stock is issued in payment, from that liability, it seems to be wholly without meaning.

The liability, as originally created in the tenth section, is limited by two things, both of which, to exempt the general stockholder must be fully complied with:

First. That the whole amount of the capital stock, fixed and limited by the company shall have been paid in.

Second. That a certificate of such payment, shall have been made and recorded as prescribed in the eleventh section.

If the legislature intended to exempt stock paid for property from liability to the creditors of the company, it, of course, intended to cover such liability, whether it arose from the fact that the capital stock had not been paid in, or having been paid in, that the prescribed certificate had not been duly made and recorded. That the legislature intended to put stock thus issued for property, upon a different footing from that of other stockholders, is, to some extent, indicated by the last provision of section 2, of the act of 1853, which says: "But in all statements and reports of the company to be published, this stock shall not be stated or reported as being issued

for cash paid into the company, but shall be reported in this respect according to the fact." It has been held in several cases, that where stock issued as full stock, has been issued for the purchase of property to an amount in excess of the value of the property, fraudulently or in bad faith, the protection of the amendatory act of 1853, against liability to the creditors of the corporation, does not extend to the holders of such stock; and it has been also held, that the question of fraudulent valuation is one of fact which may be litigated between the creditor and the stockholder. If a fraudulent valuation is given of the property purchased, then, very clearly, the stock has not been issued, "for the amount of the value thereof, in payment therefor as required by the statute;" and the holder of such stock is not entitled to the exemption created by the amendment of 1853. (*Boynton v. Andrews*, 63 N. Y., 93; *Boynton v. Hatch*, 47 id., 225; *Schenck v. Andrews*, 57 id., 133.)

*Boynton v. Andrews*, is a case where it appeared that the whole capital stock of a company, amounting to \$100,000, was issued in payment of the property of the value of less than \$50,000; and that a certificate was filed in conformity to sections 10 and 11 of the act of 1848. The facts were undisputed; and the court held as a matter of law, that the whole amount of capital had not been paid in, and directed a verdict for the plaintiff. In the course of the opinion, the court say: "The real question in cases of this character is, whether the property was placed and taken at a high valuation with a fraudulent intent of evading the provisions of the statute." It is obvious, that that case did not raise the question before us; it presented a question of fraudulent evasion of the statute, upon which the court properly held that no exemption could stand. And the court held, also, in substance, that the act of 1853, created no exemption from personal liability where the stock was not fully paid up, by reason of a fraudulent or evasive over valuation of the property purchased, and for which it was issued.

In *Schenck v. Andrews* (46 N. Y., 589), the question arose upon demurrer. The defendant's answer set up that the trustees of the corporation purchased a manufactory necessary for their business for \$100,000, the value thereof (and the full amount of the capital), and issued the whole of said capital stock to the vendor

thereof for such manufactory and property, which stock so issued was declared by said company and was taken by said vendor as "full" stock. The answer was demurred to and the demurrer was sustained at the Special and General Terms of the Supreme Court, and judgment given for the plaintiff. The Court of Appeals reversed the judgment, holding that the answer set up a defense against liability to the creditors of the company. In the opinion of the court, GROVER, J., says, "it is entirely clear that this section (speaking of section 2 of the act of 1853), designed to exonerate the holders of stock thereby authorized, from the liability to the creditors, imposed by section 10 of the act of 1848." And again, speaking of stock issued under the provisions of that section, he said, "when so paid, \* \* \* the owner is not liable to the creditors of the company under section 10 of the latter act." \* \* \* "Whether the property purchased was necessary to the business of the company, and whether the price paid therefor was no more than its fair value, are questions of fact, to be determined like other similar questions if controverted."

The question presented in that case differs from the present, only in the circumstance that the whole of the capital stock had been issued in payment for property, and that a certificate of that fact had been duly filed under the eleventh section. It cannot, therefore, be said to be conclusive of the questions of this case, because here the sworn certificate had not been filed. But, we think, the referee was right in holding that, "when the amendment of 1853 declared that the holders of stock of this character are not to be liable to any further payments under the tenth section, \* \* \* they are excepted from the operation of the tenth section of the original act, and all liabilities thereby imposed."

We think no liability was imposed upon the defendant by the alleged creation of additional stock, for several reasons:

First. The stock was not regularly created.

Second. None of it was ever issued, either to the defendant or to any other person, and in respect of it there were, therefore, no *stockholders* to be liable.

Third. It was a transaction irregular as to the defendant, and inchoate as to the company. And the referee seems to us to have

been quite right in the view that the facts shown in relation to it were immaterial.

The judgment should be affirmed.

BRADY and INGALLS, JJ., concurred.

Judgment affirmed.

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THE PEOPLE OF THE STATE OF NEW YORK EX REL.  
THE COMMISSIONERS OF PUBLIC CHARITIES AND  
CORRECTION OF THE CITY OF NEW YORK AND  
MARY L. SMITH, RESPONDENTS, v. GEORGE W. SMITH,  
RELATOR AND APPELLANT.

*Divorce — decree, when void because fraudulently obtained.*

In proceedings instituted against the relator before a police justice in the city of New York for abandoning his wife and children the defense was an absolute divorce procured by him in Utah. The decree, which was granted November 8, 1876, showed that the relator appeared by counsel; that the wife did not appear in person or by counsel, but had been served by publication; that a decree was taken by default on the ground "that the said parties could not live in peace and union together and their welfare requires a separation, and that the plaintiff *wishes to become* a resident of Beaver county, in the territory of Utah." The wife testified that her husband left his family in Brooklyn, in September, 1876, telling her that he was going to Cincinnati to open a sewing machine agency; that she was never in Utah and never knew of the suit until a copy of the decree was served upon her in December, 1876. *Held*, that the decree was fraudulently obtained and was an absolute nullity.

CERTIORARI to review the decision of the Court of Special Sessions of the city and county of New York, affirming an order made by one of the police justices of the city.

*W. C. Traphagen*, for the appellant. The judgment of a court of a sister State should have the same credit, validity and effect in every other court in the United States which it had in the State where rendered. (*McElmoyle v. Cohen*, 13 Peters, 312; *Warren Mfg. Co. v. Aetna Ins. Co.*, 2 Payne, 501; *Hampton v. McConell*,



3 Wheaton, 234; *Barber v. Barber*, 21 How. [U. S.], 591; 2 Bishop on Marriage and Divorce, 203.) A decree of divorce, valid and effectual by the laws of the State in which it was obtained, is valid and effectual in all other States. (*Cheever v. Wilson*, 9 Wall. [U. S.], 108, citing *Barber v. Barber*, 21 How. [U. S.], 591.)

*A. W. Tenny*, for the respondents. A decree of divorce obtained by the husband in another State against the wife who was not within the jurisdiction of the court, was not served with process and did not appear to defend, is absolutely void and will not be enforced in the courts of this State. (*Kerr v. Kerr*, 41 N. Y., 272; *Hoffman v. Hoffman*, 46 id., 30; *Kamp v. Kamp*, 59 id., 212 [216]; *Todd v. Kerr*, 42 Barb., 317; *Holmes v. Holmes*, 4 Lans., 388; *Moe v. Moe*, 2 Sup. Ct. [T. & C.], 647.) The divorce of the relator was obtained by manifest fraud and is, therefore, void. (*Dobson v. Pearce*, 12 N. Y., 156; *Annett v. Terry*, 35 id., 260, and cases above cited.) When a foreign judgment is made the basis of an action it may be shown that it was obtained by fraud, and the party injured thereby need not be driven to the inconvenience and expense of a suit in equity to set it aside. (*Phillippson v. Lord Egremont*, 9 Q. B., 587-605; *Lord Brandon v. Becher*, 3 Clark & Fin, 510; *Sheddon v. Patrick*, 1 Macq., 535; *Reg. v. Saddlers Co.*, 10 H. L., 431; *Tommey v. White*, 4 id., 313.)

DAVIS, P. J.:

The relator, George W. Smith, was arrested in April, 1877, on the complaint of the Commissioners of Charities and Corrections of the city of New York, charged with abandoning his wife and children in violation of chapter 508, section 3 of the Laws of 1860. Upon a hearing before the police justice, who issued the warrant, he was convicted of being a disorderly person under the provisions of said act, and an order was made requiring him to pay to said Commissioners of Charities and Corrections the sum of ten dollars, weekly, toward the support of his family, for the period of one year next ensuing. The relator appealed from that order to the Court of Special Sessions of the Peace, and on the 3d of November, 1877, the appeal was duly heard before that court, composed of GEO. E. KASMIRE, HENRY MURRAY and N. K. WHEELER, police

justices duly assigned to hold the Court of Special Sessions at that time. After hearing the parties, the said court on the fifteenth of November dismissed the appeal and affirmed the order theretofore made by Justice SMITH, and required the said relator to enter into a bond, with surety, conditioned for the payment of the said sum of ten dollars weekly. The relator sued out a writ of *certiorari* to review the last-named decision and order. It appears by the return of the police justices composing the Special Sessions, that the case was brought to trial before them on the 3d of November, 1877, and submitted for decision; that on the fifteenth of November, the court, the same justices being present, unanimously affirmed the decision appealed from, and the papers were handed to the clerk of the court, by the presiding justice, marked "affirmed;" that the decision of affirmance was not publicly announced till the twenty-second of November, and when the announcement was made, but two of the justices who heard the case were present. On that day Mr. Justice BIXBY sat as a member of the court instead of Mr. Justice KASMIRE, but took no part in the decision of the case. Upon this state of facts we think the decision of the court must be regarded as having been made on the fifteenth of November, when all the justices who heard the appeal were present, and when the papers were handed to the clerk by the presiding justice, with the decision marked thereon. The subsequent public announcement was of no legal importance, and cannot affect the validity of proceedings already complete. The delay had occurred, it seems, for the accommodation of the relator to enable him to be present, with bail, on the twenty-second. The hearing before the Special Sessions was heard by consent of the parties, upon the evidence taken and proceedings had, before the police justice, which had been returned to the Special Sessions by him. The proof showing the marriage and the alleged abandonment, and sustaining the complaint in other respects, was sufficient in our opinion to uphold the order. The only defense interposed was a decree of divorce purporting to have been obtained by the relator against Mary L. Smith, his wife, in the Probate Court of Beaver county, in the Territory of Utah, on the 3d of November, 1876. The paper purporting to be a decree shows upon its face, that the plaintiff appeared by his counsel and that the defendant neither appeared in person nor by counsel; that

she had been served by the publication of a summons for forty days, in said Territory, and that the complaint of the plaintiff was taken *pro confesso*. The decree appears to have been granted on the ground "that the said parties cannot live in peace and union together, and that their welfare requires a separation, and that the plaintiff wishes to become a resident of Beaver county, in the Territory of Utah," and is an absolute decree dissolving the marriage relation and releasing both parties from the bonds of matrimony, and all the obligations thereof and declaring them severally at liberty to marry again. The respondent proved in answer to this alleged defense that the relator left his family in September, 1876, they then residing in Brooklyn, telling his wife he was going to Cincinnati to open an agency for the sale of the Whitney sewing machine; that she, his wife, was never in the Territory of Utah; was never served with any process in the suit, and never appeared personally or by attorney; that the first notice or knowledge she had of the suit was when she received a copy of the decree of divorce, in December, 1876, and that after he left her in September, she first heard from him by receiving a copy of the decree of divorce. Upon this state of facts nothing seems clearer than that the decree was fraudulently obtained. The relator was a resident of this State where his wife and family also resided. He left, informing his wife that he was going to open an office and enter into business in Cincinnati. He immediately commenced proceedings in Utah, where neither he nor she appear ever to have been, and obtained a decree from the Probate Court upon the publication of a summons of which she had no notice or means of knowledge. The decree shows upon its face that he had not become a resident of Utah, but only contemplated becoming one, which statement of itself was doubtless false. Under such circumstances to give any force to the decree would be a gross abuse of justice, for the fraud of the relator is too palpable to be questioned. Under numerous authorities in this State, the decree was an absolute nullity unavailable for any purpose. (*Kerr v. Kerr*, 41 N. Y., 272; *Hoffman v. Hoffman*, 46 id., 30; *Kamp v. Kamp*, 59 id., 212; *Todd v. Kerr*, 42 Barb., 317; *Holmes v. Holmes*, 4 Lans., 388; *Moe v. Moe*, 2 S. C. R. [T. & C.], 647; *Dobson v. Pearce*, 12 N. Y., 156; *State of Michigan v. Phoenix Bank*, 33 id., 25, 27.)

The proceedings and order of the Special Sessions should be affirmed, and the *certiorari* dismissed with costs.

BRADY and INGALLS, JJ., concurred.

Proceedings and writ affirmed; *certiorari* dismissed.

MOSES SINGER, PLAINTIFF IN ERROR, v. THE PEOPLE OF  
THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

*Assault with intent to commit a rape* — 3 *Rev. Stat.* (6th ed.), 938, § 49 — *consent of child under ten years of age.*

In an indictment under the statute providing that every person who shall be convicted of an assault with the intent to commit robbery, burglary, *rape*, manslaughter, etc., shall be punished as therein provided, it is sufficient to allege that an assault was made upon a female child, "with intent then and there, willfully and feloniously, to commit a rape against the form of the statute," etc., and it is not necessary to allege that the intent was to "carnally and unlawfully know" the said child.

Where an assault with intent to commit rape is made upon a female child under the age of ten years, the fact that she assented thereto does not alter the nature of the crime or diminish the guilt of the accused.

Writ of error to the Court of General Sessions of the city and county of New York, to review the conviction of the plaintiff in error of an assault with an intent to commit a rape.

W. F. Howe, for the plaintiff in error.

B. K. Phelps and Horace Russell, for the defendants in error.

DAVIS, P. J.:

The prisoner was indicted for an assault with intent to commit a rape. There are two counts in the indictment; the first count charges that the prisoner, willfully and feloniously, made an assault and battery upon one Statia Gluth, she being then and there a female child, under the age of ten years, to wit, of the age of six

years, with intent willfully and feloniously to ravish and carnally know her, against the form of the statute, etc.

The second count charges an assault upon the same person ; she then and there being a female child of the age of six years, with intent then and there in and upon her, the said Statia Gluth, by force and violence to then and there willfully and feloniously commit a rape, against the form of the statute, etc.

The jury found the prisoner guilty under the second count of the indictment. The point was made on the trial, and the court was asked in substance to charge that there could be no conviction under the second count, because the intent was not alleged to be, *carnally and unlawfully to know the child*. The court overruled the point, and refused to charge as requested, and an exception was taken.

The language of the statute under which the second count of the indictment was framed, is as follows : " Every person who shall be convicted of an assault with the intent to commit any robbery, burglary, rape, manslaughter, or any other offense, punishment for which assault is not hereinbefore prescribed, shall be punished by imprisonment in a State prison for a term not exceeding five years, or in a county jail not exceeding one year, or by a fine, not exceeding \$500, or by both such fine and imprisonment." (2 R. S., 666, § 39 ; 3 id. [6th ed.], 938, § 49.) We think that under this statute the offense was sufficiently charged in the second count of the indictment.

The charge is, that the prisoner, " with force and arms, in and upon the said Statia Gluth, she the said Statia Gluth being then and there a female child under the age of ten years, to wit, of the age of six years, willfully and feloniously made an assault with intent then and there in and upon her, the said Statia Gluth, by force and violence to then and there willfully and feloniously to commit a rape, against the form of the statute," etc. The crime of rape, where the subject thereof is an infant child is, by statute, " the carnally and unlawfully knowing a female child under the age of ten years." Inasmuch as the indictment charges a felonious assault upon a female child of the age of six years, with the intent willfully and feloniously to commit a rape, we think the facts constituting the offense are set forth with sufficient particularity. It would perhaps be better pleading in such a case, to allege the

intent to have been to carnally and unlawfully know a female child under the age of ten years; yet that was not necessary, although the proof must establish the intent to have been to accomplish an act within the description of the statute. The statute in relation to the assault uses the word "rape," and it seems to us only necessary, in connection with that word, to specify the circumstances of the crime charged, in such manner that the accused cannot be misled in respect of the matters intended to be proved; and that is fully accomplished by the count of the indictment in question.

The child in this case testified to her own age, stating that she was between six and seven years; and no point was made on the trial as to the sufficiency of this evidence. Further proof could readily have been supplied if any question had been suggested, and for that reason it is not competent now to object to the sufficiency of the proof on that subject.

It appeared by her testimony that the child consented to the acts done by the prisoner, and it is insisted that where there is consent there cannot be an assault in law. This point is completely covered by the case of *Hays v. The People* (1 Hill, 351). In that case the prisoner was indicted and convicted of an assault with intent to commit a rape upon a female child under ten years of age, and the court held that "the assent of such an infant being void as to the principal crime, is equally so in respect to the incipient advances of the offender. That the infant consented to, or even aided in the prisoner's attempt, cannot therefore, as in the case of an adult, be alleged in his favor, any more than if he had consummated his purpose." A female child, under ten years of age, is incapable in law of consenting to the act which constitutes rape under the statute, and hence the question of consent becomes wholly immaterial on the trial of an indictment, either for the principal offense, or for an attempt to commit the crime. The absence of consent is not an element in the crime of rape when committed upon a female under ten years of age, and its presence is wholly immaterial. It is illogical therefore to say that the presence of consent is material where the offense charged is an assault with intent to commit a crime in which that element is in every sense immaterial. In changing the common law of rape in such cases, we think the legislature have necessarily changed the offense of assault with

intent to commit that crime, so far as it could be affected by proof of consent by the infant.

In this case the child, in giving her testimony, made statements which if received and credited precisely as given, tended to establish that the crime of rape was actually perpetrated. The court was asked by the prisoner's counsel to charge that if any thing was proved it was rape, and that the prisoner could not be convicted of the crime charged in the indictment because the principal offense was proved to have been committed. The court held that the jury had a right to find upon the evidence a lesser offense than that of rape, and that it was for the jury to say if the offense charged in the indictment had been sustained.

The court was not asked to instruct the jury, that if they found that a rape was actually perpetrated there could be no conviction under the statute for an assault with intent to commit that crime; but the request was in substance that the case be wholly taken away from the jury upon the evidence, the court determining that the crime of rape was as a matter of fact, established by the evidence. We think under the circumstances of the case that it was no error for the court to decline to do this. The jury had the child before them. They had proof of her age, and were entitled to judge from her manner and appearance, and the description which she gave of what occurred, whether or not she intended to testify, and whether she knew, that the alleged intent of the prisoner was so fully consummated, as to constitute the crime of rape. She stated facts also, quite inconsistent with the idea of the complete penetration of her person which she seemed to think had taken place; and the extreme youth of the child and all the surrounding circumstances as described by herself and the other girl who was present, seem to us to have justified the jury in finding that nothing more than an attempt to have carnal connection was committed. We do not see in the case any substantial error that would justify us in interfering with the conviction and judgment.

The judgment should, therefore, be affirmed.

BRADY and INGALLS, JJ., concurred.

Judgment affirmed.

EDGAR WILLIAMS AND OTHERS, AS ADMINISTRATORS, ETC., OF  
LORRAIN FREEMAN, DECEASED, RESPONDENTS, v. JAMES  
W. GILLIES, IMPLEADED, ETC., APPELLANT.

*Partnership for purchase of land — oral agreement for — liability of partners.*

Dobbs, Raynor and Gillies agreed, orally, that Dobbs should purchase certain real estate in his own name and give back a mortgage thereon for part of the purchase-money; the real estate to be held for speculative purposes and sold for the joint benefit of all; the profits to be divided among them in proportion to the amount contributed by each. Dobbs accordingly purchased the property and gave back a mortgage to plaintiff's testator, who was at the time ignorant of the partnership. In an action to foreclose the mortgage the judgment directed that each of the partners should be liable for such proportion of any deficiency that might arise upon the sale as corresponded to his interest in the land.

*Held*, that this was as favorable a judgment for the partners as they were entitled to; that under such circumstances the name of the partner, used in the transaction, becomes, *pro hac vice*, the partnership name.

APPEAL, by defendant Gillies, from a judgment of foreclosure, entered upon a trial of this action by the court without a jury.

The court found, among other things, that in October, 1872, the defendant William H. Dobbs made a contract with the late Lorrain Freeman for the purchase of the land in question; that it was agreed between said Dobbs, the defendant, James W. Gillies and the late William H. Raynor that said property should be bought for their joint benefit, said Raynor contributing one-half, said Dobbs one-quarter and said Gillies one-quarter of the purchase-price, and that said Gillies, Dobbs and Raynor were to share in the profits of said enterprise *pro ratio*; that it was agreed between said Gillies, Dobbs and Raynor that said Dobbs should make said contract for their mutual benefit, and that Dobbs should take the title and give back the bond and mortgage mentioned in the complaint; that said Gillies, Dobbs and Raynor, in pursuance of said agreement, each contributed their proportional share of the purchase-money paid in part, and, also, as long as interest was paid upon the mortgage each paid his proportionate share of such interest; that said property was bought for speculative purposes, to be sold and the profit divided between them *pro ratio*; that Dobbs was authorized by Gillies and Raynor to execute and deliver said bond and mortgage to Freeman, and they afterwards ratified the act.



That, in pursuance of said contract, the said Freeman did, on the 2d day of January, 1873, execute and deliver to said William H. Dobbs a warranty deed of said premises.

That the defendant William H. Dobbs, on or about the 2d day of January, 1873, executed and delivered to the said Freeman a bond and mortgage, to foreclose which this action was brought.

As conclusions of law, the court found that the executrix of the estate of said William H. Raynor was liable to the plaintiffs, as executors as aforesaid, for the payment of one-half of any deficiency that might arise on the sale of said premises.

That said James W. Gillies was liable to the plaintiffs, as executors as aforesaid, for one-quarter of any deficiency that might arise on the sale of said mortgaged premises.

That said William H. Dobbs was liable to the plaintiffs, as executors as aforesaid, for one-quarter of any deficiency that might arise on the sale of said mortgaged premises.

*James M. Fisk*, for the appellant. The contract between Dobbs and Freeman for the purchase of the property as well as the bond and mortgage given by Dobbs being under seal, cannot be changed by oral testimony into a simple contract so as to enforce it against persons not parties to it. (*Townsend v. Hubbard*, 4 Hill, 351; 2 R. S., 135, §§ 8, 9; *Briggs v. Partridge*, 64 N. Y., 357.) Parol evidence cannot be introduced to contradict, change, enlarge or vary the terms of a written instrument under seal, except in cases of fraud or gross concurrent mistake. (See Wharton on Evidence, § 920, note 1 on page 155, 2d vol.; § 1014 and § 1050, and cases there cited; *Renard v. Sampson*, 12 N. Y., 561; *Halleday v. Hart*, 30 id., 474; *Pollen v. Le Roy*, id., 549; *Thorpe v. Ross*, 4 Keyes, 546; *Riley v. City of Brooklyn*, 46 N. Y., 444; *Long v. N. Y. C. R. R. Co.*, 50 id., 76; *Collender v. Densmore*, 55 id., 204; *Briggs v. Partridge*, 64 id., 357.) Whatever agreements and understandings there might have been between the parties prior to the making and execution of the instrument and deeds, must be held to have been extinguished by the execution and delivery of the conveyances and be held as expressing the final views of the parties and expressing the terms of the contract between them. (*Gage v. Jaquethe*, 1 Lans., 207, and cases cited above.) No one

is liable to be sued in the foreclosure action, except a party to the mortgage or those who by valid agreement assume or guarantee the same. (*Holcomb v. Holcomb*, 2 Barb., 20; *Le Roy v. Shaw*, 2 Duer, 626; *Spencer v. Wheelock*, 11 N. Y. Leg. Obs., 329; *Tibbets v. Percy*, 24 Barb., 39; *Strong v. Wheaton*, 38 id., 616.) Even if the defendants were partners there is no cause of action against Gillies in favor of plaintiff. When a person gives credit to one partner alone he cannot call upon the rest as if the creditor sold him goods, \* \* \* or loaned him money. (Parsons on Partnership [2d ed.], marginal pages 104, 105, note to page 105; *Parken v. Caruthers*, 3 Esp., 248; *Loyd v. Frestfield*, 2 C. & P., 325; *Bevan v. Lewis*, 1 Sims, 376; *Lerroy v. Johnson*, 2 Peters, 186; *Bird v. Lavins*, 4 Wis., 615; *Clay v. Cottrell*, 18 Penn., 408; *Muller v. Morrice*, 6 Hill, 114; *Holmes v. Burton*, 9 H., 252; *Jaques v. Marquand*, 6 Cowen, 497; per BALDWIN, J., in *Winship v. Bank of United States*, 5 Peters, 567; *Foster v. Hall*, 4 Humph., 346; *Union Bank v. Eaton*, 5 id., 499; *Green v. Tanner*, 8 Met., 411; *Osborn v. Jacobs*, 9 id., 454.) The rule is well settled also that when a bond or other specialty of one partner is taken for the simple contract debt of a partnership the firm cannot be held liable on such specialty. (*United States v. Ashley*, 3 Wash. C. C., 512; *Patterson v. Brewster*, 4 Edw. Ch., 352; *Ward v. Johnson*, 13 Mass., 150; *Collier v. Leech*, 29 Penn. St., 404; *Clement v. Brush*, 3 Johns. Cas., 108; *Williams v. Hodgson*, 2 Harris & J., 474; *McNaughton v. Partridge*, 11 Ohio, 223; Pars. on Partnership [2d ed.], marginal page 833; *Nat. Bank of Chemung v. Ingraham*, 58 Barb., 290; *Marvin v. Buchanan*, 62 id., 468.) A sealed instrument, when executed by one acting as an agent or attorney, must be executed in the name of the principal and purport to be sealed with his seal or the person named as principal will not be bound by it. (*Townsend v. Hubbard*, 4 Hill, 351; *Clarke v. Courtney*, 5 Peters, 319, 351; *Elwell v. Dean*, 16 Mass., 42; *Brinley v. Mann*, 2 Cush. [Mass.], 337.) Nor where it does not refer to the principal. (*Squier v. Norris*, 1 Laws, 282; *Wood v. Goodrich*, 6 Cush. [Mass.], 117; *Galusha v. Hitchcock*, 29 Barb., 193.) The authority to an agent to sign a sealed instrument must be under seal. (*Blood v. Goodrich*, 12 Wend., 526; *Worrall v. Munn*, 5 N. Y., 229; *Boyd v. Dobson*, 5 Humph., 37; *Cooper v. Rankin*, 5 Binn., 613; *McNaughton*

v. *Partridge*, 11 Ohio, 223; *Preston v. Hull*, 22 Gratt. [Va.], 600.)

*Fred. H. Kellogg*, for the respondents. A partnership may exist between dealers and speculators in real estate for the purpose of buying and selling lands, and may be created by parol. (*Chester et al. v. Dickerson et al.*, 54 N. Y., 1, and cases cited; 2 Barb. Ch., 198-336; 52 Barb., 349; *Sage v. Sherman and others*, 2 N. Y., 417; Willard on Real Estate, 376; *Block v. Col. Ins. Co.*, 47 N. Y., 652; 31 id., 611.) It is a well-settled principle that when the ostensible partner is alone known in the transaction all persons who are to share in the profits are held liable to a third person, even though he is ignorant of the existence of the partnership and relied solely upon the faith and credit of the ostensible partner. (*The Ontario Bank v. Hennessy*, 48 N. Y., 545-550; *Poillon v. Secor*, 61 id., 458; Story on Partnership, 53, 80, 138, 139; Collyer on Partnership, 227-537; *Kelley v. Hurlbut*, 5 Cow., 535; 1 Den., 402-471; 10 N. Y., 51.)

DAVIS, P. J. :

It is now well settled in this State that a partnership may exist between dealers in real estate for the purpose of buying and selling land for profit; and that such partnerships are governed substantially by the same rules as partnerships for dealing in personal property, except as necessarily modified by the operation of the rules of law in reference to the conveyance and assignment of real estate. (*Chester v. Dickerson*, 54 N. Y., 1; *Sage v. Sherman*, 2 id., 417; *Ontario Bank v. Hennessey*, 48 id., 545.) In the case of such a partnership, it may be agreed orally between the partners that the title shall be taken, and the business done altogether in the name of one of the partners; and where such an arrangement is made, one legal result is, that the name of the partner used becomes, *pro hac vice*, the partnership name of the firm, and all the members of the firm may be bound by acts done by him in such name and within the scope of his authority, upon the same principal and to the same extent as are the several partners whose names do not appear in the firm name in ordinary partnerships, for acts done by one of the partners in the firm name.

The court below found in this case that the lands described in the mortgage executed by Dobbs, were purchased by Dobbs, Raynor and the appellant, as copartners for their joint benefit, and for speculative purposes, each to share *pro rata* in the profits. This finding is clearly sustained by the evidence in the case. By mutual arrangement the title of the lands was taken in the name of Dobbs for the benefit of all the parties interested, and he executed the mortgage sought to be foreclosed in this action, in his own name to carry out the arrangement between himself and the other parties interested. The fact that the partnership was unknown to the plaintiff's testator at the time the mortgage given for a portion of the purchase-money was executed, was not a material one. (*Ontario Bank v. Hennessey, supra* ; *Poillon v. Secor*, 61 N. Y., 456 ; Story on Partnerships, § 53 *et seq.*)

The transaction in this case seems to have been altogether a losing one ; but that is no reason for relieving either of the partners from his just share of responsibility. Had it proved a profitable one, it is not likely that such relief would be sought, or desired. As between the several defendants who are copartners, it would be highly inequitable that the one whose name was used should stand charged with all the consequences of the unfortunate enterprise. The plaintiffs in their complaint have only prayed, as relief in respect of a possible deficiency, that each partner may be charged separately, precisely as the liability of the several partners with respect to each other existed ; and the court ordered judgment accordingly. The appellant is charged by the decree with an equal fourth of any deficiency that may accrue. The plaintiffs, treating the three defendants as copartners, might have asked for a decree for the deficiency against them *in solido*, which, under circumstances easily imagined, would have been a much harsher judgment against the appellant. He has no cause to complain of the form of the judgment, inasmuch as it relieves him from all liability beyond that which he was bound to bear as between himself and his copartners.

We see no reason for disturbing the judgment, and it should be affirmed with costs.

INGALLS, J., concurred ; BRADY, J., not sitting.

Judgment affirmed, with costs.

ANN CONNORS, AS ADMINISTRATRIX, ETC., APPELLANT, v.  
WALTER W. ADAMS, RESPONDENT.

*Public officer — liability of, for neglect of official duty, to person injured thereby.*

The complaint in this action alleged that the defendant was the head of the department of buildings in the city of New York; that it was his duty to see that all unsafe buildings in said city were taken down or made secure, and that he was furnished with the means necessary to fulfill the said duty; that a building, known as No. 25 Duane street, was so injured by fire as to render it unsafe and that defendant had notice of its condition; that the said building fell upon an adjoining building in which the plaintiff's intestate lawfully was and killed her, and asked judgment for damages against the defendant.

*Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, should be overruled.

APPEAL from an order sustaining a demurrer of the defendant to the complaint, and from a judgment entered thereon in favor of the defendant against the plaintiff for costs, etc.

The complaint alleged, among other things, "that the defendant above named was and is the superintendent or head of the department of buildings of the city of New York, duly appointed and created and qualified by law, and as such had possession and control over the said department, as aforesaid, for the doing and performing of all the acts and duties incumbent and devolving by law upon said department, and the officers of the same under and subordinate, and subject to the said defendant, at all the times hereinafter mentioned.

That, among other things, it is by the laws of the State of New York made the duty of the said defendant \* \* \* whenever any building or other structures in the city of New York shall at any time become dangerous or unsafe and endanger life or limb, to cause said building, or parts of a building, to be taken down, or removed or made secure, and the said defendant, as superintendent or head of said building department as aforesaid, is and was authorized and empowered, at all the times hereinafter mentioned, to employ such labor and furnish such materials as may be necessary to take down and remove or make secure any building, wall or walls, parts of walls or party walls which may or have become

dangerous or unsafe from fire or other cause, and the expense incurred in the taking down and removal thereof or in making the same secure is, by the laws in such cases made and provided, made a charge upon the owner of said premises and a lien thereon.

And the complaint further shows that on the 12th day of January, 1875, a large building in said city, known as No. 25 Duane street, and the walls thereof was and were injured by fire, to so great an extent that said building and the wall, walls or parts of walls thereof, became and were then and thereafter, down to the time when the injury hereinafter referred to happened, unsafe and dangerous to life and limb and to the occupants of the adjoining buildings and to all persons passing in front of, into and upon the same, of all of which the said defendant had due and sufficient notice.

That adjoining the said building and lot, was a building, or church edifice, called St. Andrew's church, which was then and had been for many years prior thereto used as a house and place of religious worship, which fact was also well known to the said defendant herein, and of which he had due and sufficient notice.

That on the evening of the 25th day of February, 1875, one Mary Ann Connors, since deceased, was attending and engaged in religious services in St. Andrew's church edifice, and while the religious services, usual and customary at that season of the year, were being held therein the walls of said building, known as No. 25 Duane street, which, after the fire aforesaid, had been left, permitted and suffered, wrongfully, unlawfully and negligently by the said defendant, to remain standing and unrepaired and unreconstructed or removed, and dangerous to life and limb and to the occupants thereof and all persons passing in front of the same, fell in and upon the roof of said church, and the bricks and other materials composing the same were precipitated upon the roof of said church edifice breaking through said roof, and said bricks, together with the material composing said roof, fell and descended into the audience room of said church edifice and upon the body and person of said Mary Ann Connors, crushing, bruising and wounding said Mary Ann Connors to so great an extent that from the effects of such wounds, bruises and injuries then and there received she subsequently soon after died without any fault on her part.

And the complaint further shows that during all the time that elapsed between the time when said building was injured by fire, as aforesaid, and the time when said walls fell and inflicted the injuries herein complained of upon the said Mary Ann Connors, the defendant well knew that said walls of said building were dangerous to life and limb and to occupants of the adjoining buildings, and the said defendant so carelessly and negligently conducted himself and violated and neglected the duties duly imposed by law in connection therewith, that he wholly failed, neglected and refused to take down said walls, as aforesaid, or to make the same secure, or to rebuild, repair or reconstruct the same, or to cause the same to be duly done, by reason of which negligence, want of due care and attention to his duties in that behalf, on the part of said defendant, the said Mary Ann Connors was terribly injured and killed, as hereinbefore more fully set out and mentioned, without any fault or neglect on her part.

*James M. Lyddy*, for the appellant.

*D. J. Dean*, for the respondent.

DAVIS, P. J. :

The complaint in this action is not well drawn, but under its allegations we think the plaintiff would be entitled to prove any state of facts necessary to show that the defendant had been guilty of such neglect of official duty as would charge him with liability for the injury suffered by the plaintiff's intestate. It was not necessary to set forth all the evidence requisite to establish that condition of things. Hence the question presented upon this demurrer is, whether the defendant can be held liable in a civil action for a private injury, for any degree or kind of negligence of which he may have been guilty in performing or neglecting to perform his official duty.

Whatever may be the law in other States upon that subject, we think the question of the defendant's liability is settled in this State by the case of *Adsit v. Brady* (4 Hill, 630), *West v. Trustees of Brockport* (in note to 16 N. Y., 168), *Robinson v. Chamberlain* (34 id., 389).

In *Adsit v. Brady* the broad rule is laid down that where an individual sustains an injury by the misfeasance or nonfeasance of a public officer who acts or omits to act contrary to his duty, the law gives redress to the injured party by an action adapted to the nature of the case. That rule received a very emphatic approval in *Robinson v. Chamberlain*; and if the opinion of Mr. Justice SELDEN in the case of *West v. Trustees of Brockport (ubi supra)*, tended to impair that rule, it was restored to full vigor by the decision of the court in *Robinson v. Chamberlain*.

In *Murphy v. The Commissioners of Emigration* (28 N. Y., 134) the board of commissioners was held not liable because they were not guilty of any personal negligence; and the court said that if any members of the board had failed in their duty, and the plaintiff had suffered in consequence of such failure, they might be individually liable, but the consequences of their individual misconduct, if there were any, could not be visited upon the board.

In this case the duty, if any existed, appertained or is charged to belong to the individual officer, and the negligence alleged by reason of which the injury was suffered, is distinctly charged to have been his own. We are of opinion that the demurrer should have been overruled, and that the order and judgment should be reversed and judgment given for the plaintiff upon the demurrer, with leave to defendant to answer over on the usual terms.

INGALLS, J., concurred.

BRADY, J. :

I think, under the allegations in the complaint, the demurrer could not be sustained. I concur in the result, therefore.

Judgment reversed; judgment ordered for plaintiff on demurrer with leave to answer over on the usual terms.



WILLIAM H. WICKHAM, AS RECEIVER OF THE SECURITY LIFE INSURANCE AND ANNUITY COMPANY, APPELLANT, v. JONATHAN A. FRAZEE, RESPONDENT.

*Action — when it sounds in tort — reference — Trustees of insolvent debtor — references of claim by — procedure on application for — 3 R. S. (6th ed.), p. 89, §§ 21, 22*

This action was brought by the receiver of an insolvent insurance company to recover dividends alleged to have been wrongfully paid to the defendant, a stockholder of the company, at a time when the corporation was insolvent, such payments having been made out of the capital and assets of the company and received by the defendant in fraud of the rights of the creditors of the company.

*Held*, on a motion to refer the action, on the ground that it involved the examination of a long account, that the action sounded in tort and could not be referred against the objection of either party.

In order to authorize a reference under sections 21 and 22 of 3 Revised Statutes (6th ed.), page 39, relating to references of claims by trustees of insolvent debtors, it must be shown that the party making the application has offered to agree upon a reference, and that the other party has refused or neglected to consent thereto; and the application must be made, not to the court upon motion but to the officer who appointed the trustees, or to a justice of the Supreme Court at chambers residing in the district, upon a notice of at least ten days.

*Quære*, whether under this statute a reference can be ordered in an action sounding in tort.

APPEAL by plaintiff from an order denying a motion for a reference, on the ground that the trial of the action would involve the examination of a long account.

The action was brought by the plaintiff, as receiver of the Security Life Insurance and Annuity Company, against the defendant to recover \$180 for dividends paid to him by said company between the 1st May, 1871, and the 17th November, 1876, and which, as is alleged, were paid while said company was insolvent. The dividends were paid semi-annually, and a several and separate cause of action for each of said dividends is set out in the complaint.

The answer admitted the receipt of the dividends, set up the statute of limitations as to part of the amount claimed, alleged that the

dividends were received in good faith, and further denied any knowledge of the alleged insolvency or fraud of the directors.

*Hamilton Cole*, for the appellant.

*William F. Macrae*, for the respondent.

DAVIS, P. J.:

The receiver in this case was appointed under the provisions of the Revised Statutes concerning proceedings against corporations in equity. (See the article in Bank's 6th ed. Rev. St. [3d vol.], p. 749.) And under section 55 of said act he possesses all the power and authority conferred and is subject to all the obligations and duties imposed in article 3 of the same title of the statute, upon receivers appointed in case of a voluntary dissolution of a corporation. One of the powers conferred upon receivers appointed on a voluntary dissolution of a corporation is "the same power to settle any controversy that shall arise between them and any debtors or creditors of such corporations by a reference, as is given by law to trustees of insolvent debtors, and the same proceedings for that purpose shall be had with like effect, and application for the appointment of referees may be made to any officer authorized to appoint such referees on the application of trustees or insolvent debtors," etc. (3 Rev. Stat. [Bank's 6th ed.], p. 755, § 88.)

The statute referred to in relation to trustees or insolvent debtors provided, that "if any controversy shall arise between the trustees and any other person in the settlement of any demands against such debtor, or of debts due to his estate, the same may be referred to one or more indifferent persons who may be agreed upon by the trustees and the party with whom such controversy shall exist, by a writing to that effect signed by them."

"If such referee or referees be not selected by agreement, then the trustees, or the other party to the controversy, may serve a notice of their intention to apply to the officer who appointed said trustees, or to any judge of the Supreme Court at chambers, residing in the same district with the trustees, for the appointment of one or more referees, specifying the time and place when such application will be made, which notice shall be served at least ten days

before the time so therein specified." (3 Rev. Stat. [Bank's 6th ed.], p. 39, §§ 21, 22.) The application for a reference in this case was not made under the provisions of these statutes. It is an ordinary motion for the appointment of a referee in an action, on the ground that the action involves the examination of a long account.

The statutes above referred to contemplate an effort at least, by one or both of the parties to agree upon a referee or referees, and a failure of such effort. It should be shown that the party making the application had at least offered to agree upon referees and that the other party had refused, or neglected to consent to such reference, or that some sort of an attempt had been made to select referees by agreement, and then the application must be made, not to the court upon motion, but to the officer who appointed such trustees or to any justice of the Supreme Court at chambers, residing in the same district, upon a notice of at least ten days before the time, therein specified for the application. The appointment is, therefore, to be made by the officer or a judge, and not by the court. No such formality of proceeding was observed in this case, and we think the several statutes referred to had no application to this motion.

The question of the constitutionality of a reference under the statute is not involved in the case. The action is brought to recover several dividends, alleged to have been wrongfully paid by the insurance company to the defendant as a stockholder, at a time, in respect of each, when the corporation was insolvent. The complaint charges that at the time of each payment, the insurance company was insolvent, and its assets were insufficient to pay its debts and meet its obligations and liabilities, and said dividends were not paid out of any surplus profits of said company; but, on the contrary, each and all of them were wrongfully paid out of the capital and assets of said company, which were at the several times mentioned, and have ever since continued to be and now are insufficient to pay the debts and meet the obligations and liabilities of said company without the return of said dividends, and each and all of said dividends were paid to and received by this defendant in fraud of the rights of creditors and persons holding obligations of said company, and alleges a demand upon the defendant and his refusal to pay the same or any part thereof. The action is one sounding in *tort*. It

is based upon fraud in law, if not in fact, and is therefore, according to the well-settled authorities, not referable against the objection of either party.

The affidavit of the receiver shows that an examination into the various assets and accounts of the company will be necessary for the purpose of establishing the alleged insolvency. But that is an examination not of the subject-matter of the action, but of things collaterally or incidentally necessary, in order to establish the alleged right to recover.

Such an examination does not constitute "a long account" as required by the provisions of the Code.

We think the action is not one in which any compulsory reference can be ordered, unless it be in the special statutory proceeding above considered, and upon that question we refrain from passing.

The order should be affirmed, with ten dollars costs and disbursements.

INGALLS, J., concurred; BRADY, J., concurred in the result.

Order affirmed, with ten dollars costs and disbursements.

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THE PEOPLE OF THE STATE OF NEW YORK, RESPONDENT AND APPELLANT, v. THE BANK OF NORTH AMERICA, RESPONDENT AND APPELLANT.

*Motion to send back a case to a referee for further findings — when denied.*

Upon a motion for an order to send back a case to a referee for further findings, it appeared that he had already passed upon such questions by refusing to find as requested, and that in each case the party requesting the finding had duly excepted to his refusal so to find.

*Held*, that the motion was properly denied, as upon such a motion the Special Term was not authorized to look into the whole case and determine that the referee ought to decide questions presented to him differently from what he had already done.

APPEALS of the above-mentioned parties, respectively, from orders made at Special Term held by Mr. Justice BRADY, denying their respective motions to send back the case to the referee for further findings.

*Francis C. Barlow*, for the plaintiff.

*Elihu Root*, for the defendant.

DAVIS, P. J.:

In each of these motions, the affidavit on which the motion was founded showed distinctly that the referee had already passed upon each and every of the questions presented by the requests, by refusing to find the same as requested, and in each instance the party making the request had duly excepted to such refusal. The motions were, therefore, properly denied. The referee had not declined to pass at all upon the questions and therefore omitted to make any decision, but he had passed upon each of them and made a distinct decision which was the subject of an exception, and to which an exception was taken. Where that has been done we do not understand that the practice requires or permits the party taking the exception to move at Special Term, on an affidavit stating that the referee "wrongly and erroneously" refused to make the finding requested, that the referee be instructed to pass upon the question again.

The Special Term is not authorized to look into the whole case, and determine that the referee ought to decide questions presented to him differently from what he has already done. The question whether his refusal is error is raised by the exception, and may be presented upon the appeal. It is only in cases where the referee has declined to find, or to refuse to find a material fact, that the Special Term, on motion, may direct him to pass upon such fact. The learned court below was correct, therefore, in denying both of the motions, and its order should be affirmed. The appeals from these orders are embodied in the case on the appeal from the judgment, but as Mr. Justice BRADY cannot sit for the determination of such appeal, a distinct decision, in which he takes no part, is necessary to be made by the other members of this court, and orders of affirmance should be entered accordingly.

INGALLS, J., concurred; BRADY, J., taking no part.

Orders affirmed.

ISABELLA B. NOE, APPELLANT, v. WILLIAM F. NOE,  
RESPONDENT.

*Abandonment of husband by wife—right of wife to compel a provision for her maintenance.*

In this action, brought by the plaintiff against her husband, she alleged that shortly after her marriage she had conveyed to him the greater part of all her property, both real and personal; that the defendant had taken possession of the same and spent large sums in gambling and riotous living; that the plaintiff was now living apart from her husband with her mother and had no means of support, and she prayed that a portion of the real estate held by her husband might be conveyed to her for her support and maintenance.

Upon an application for an injunction restraining the defendant from collecting the rents of the real estate or selling or disposing of the same, *pendente lite*, held, that, as the wife had voluntarily separated from her husband and did not charge him with adultery or any act of cruelty or desertion which would entitle her to a limited divorce, the motion was properly denied.

APPEAL from an order of the Special Term vacating a temporary injunction and refusing an injunction, *pendente lite*, to enjoin the defendant from selling, conveying, and collecting the rents of certain real estate described in the complaint.

The complaint alleged that in August, 1873, the plaintiff and defendant were married; that in April, 1874, the plaintiff came into possession of her father's estate, and in August of that year conveyed the larger part of it to her husband; that he had wasted large sums in gambling and riotous living; that plaintiff had left her husband and was residing with her mother and had no means of support whatsoever, all her estate having been sold or mortgaged by defendant as well as her personal property. She prayed that certain of the real estate held by the husband might be conveyed to her for her support and maintenance.

After the commencement of the action an application was made to have the defendant enjoined from collecting the rents of the property described in the complaint, or from selling or disposing of the same.

The defendant claimed that the plaintiff had left him without any just cause; that he was and always had been ready to support and maintain her if she would return and live with him, and denied that he had wasted large sums in gambling and riotous living.

*C. W. Sandford*, for the appellant.

*Townsend & Weed*, for the respondent.

DAVIS, P. J.:

Equity abhors the separation of husbands and wives without necessity or adequate cause, and the consequent breaking up of families, and in this it accords with the teachings of religion, the dictates of sound morality and the best interests of society. Where the separation of a wife from her husband is voluntary on her part and is caused by no infidelity, or cruelty or ill-treatment on his part, equity will afford her no aid whatever in accomplishing a purpose which is deemed subversive of the true policy of the matrimonial law. So interested, indeed, are courts of equity to promote the reconciliation of married parties living separately that they will, on no occasion whatever, enforce articles of separation by decreeing a continuance of the separation. (Story's Equity, vol. 2, §§ 1426-27, and cases there cited.)

In *Bullock v. Menzies* (4 Vesey, 798) the court refused to give the wife any part of the interest of her own property, because she refused to live with her husband when he was willing to receive and provide for her, and had given her no just cause for separation.

In her complaint in this action the wife does not charge her husband with any act of infidelity to the marriage vow, nor with any act of cruelty, or desertion which would entitle her to a separation or limited divorce under the laws of this State. On the contrary, the affidavits tend strongly to show that she has abandoned her husband without having any sufficient or reasonable cause, and is now seeking to reach his property for the purpose of enabling her to live separately and independently of him. It is true that the property that she seeks to reach was derived from her; but there is no allegation that she was induced to convey the same by reason of any fraud, undue influence, or improper persuasion on his part, or on the part of any one on his behalf. It was the voluntary and generous gift of her own affection, made in such form as to carry to him a complete and perfect title. It can no longer be said to be her property, but must, under the circumstances disclosed in the affidavits, be treated as his.

"This court," said the chancellor in *Fry v. Fry* (7 Paige, 461),

“does not encourage a breach of duty on the part of the wife by affording her a maintenance out of the property which belongs to the husband at law by virtue of his marital rights, although it came to her by descent or gift from her own relatives, while she continues to reside apart from her husband against his consent, and without any justifiable cause.”

No ground for interference with the defendant's property, because of his improvidence or extravagance is shown, within the rule laid down by the chancellor in *Van Duzer v. Van Duzer* (6 Paige, 366). This rule is not to be confounded, however, with that which the court applies in cases where the husband is seeking the aid of a court of equity for the purpose of reducing the wife's property to possession, or any other relief to which he was formerly entitled at law in reference to her estate. (*Howard v. Moffatt*, 2 Johns. Ch., 206; *Van Epps v. Van Deusen*, 4 Paige, 64; 3 Story's Eq., 641, 1414; *Udell v. Kenney*, 3 Cow., 590; 8 Kent's Com. [2d ed.], 139.)

It seems quite apparent that when Mrs. Noe left her husband in Paris, for the purpose of a temporary visit to her friends in this country, she had no idea of separating herself from him. The letter that she wrote immediately on her arrival home, indicates not only warm affection for him at that time, but an intention speedily to return to him. The change in her sentiments and purposes, which took place in the few weeks that elapsed between her arrival in this country and his return, cannot be attributed to any act of his during that interval. Her refusal to see him or to permit him to see her on his arrival, was unexplained and unreasonable. But it is not difficult to see in the papers before us, that it was produced by hostile and injurious influences. In a note which the plaintiff wrote to defendant's father she says, “I have nothing to do with any of my property, as I have given all into my mother's hands, and it is not satisfactory to her, for she wants all statements and papers in her own hands.” This sentence furnishes a key that seems to unlock the mystery of the trouble between this husband and wife; and it certainly does not disclose a state of things which calls either for the sanction or aid of the court.

The order of the court below should be affirmed.

INGALLS, J., concurred; BEADY, J., not sitting.

Order affirmed.



ROBERT A. MILLS, RESPONDENT, v. HENRY RODEWALD,  
APPELLANT.

*Order of arrest — motion to vacate — denied with leave to renew — renewal of motion after judgment.*

November 20, 1869, an order for the arrest of the defendant was granted in this action, and on December 28, 1869, a motion to vacate the same was denied with leave to renew the motion on showing the amount secured by an attachment previously issued in the action. In 1872 the action was tried and judgment recovered by the plaintiff. In February, 1877, this motion was made to vacate the order of arrest.

*Held*, that it was properly denied as the leave to renew was only given for a special purpose, and the right to renew was terminated by the entry of the judgment.

APPEAL by defendant from an order denying a motion to vacate an order of arrest.

*George C. Genet*, for the appellant.

*Thos. Bracken*, for the respondent.

DAVIS, P. J. :

The order of arrest in this case was made November 20th, 1869. The motion to vacate the order was made upon the original papers and affidavits in December following, and denied on the twenty-eighth day of that month. By the order of denial leave was given to renew the motion, on showing the amount secured by the attachment previously issued.

The judge who heard the motion indorsed on the papers a memorandum, as follows :

“The motion to vacate the order of arrest is denied, with leave to renew the motion on showing the amount secured by the attachment. It is oppressive to obtain an order of arrest after an attachment has been levied to secure the claim, and both remedies should not be resorted to.”

It thus appears that the leave to renew was given for the pur-

pose of enabling the defendant to show that the claim upon which the action is brought was wholly or in part secured by the attachment previously levied, and doubtless with the intention of enabling him to move to discharge the order of arrest, on the ground that the plaintiff had secured his claim, or so much of it that the amount for which he was held to bail should be reduced. There was no renewal of the motion for any such, or any other purpose, prior to the judgment. In 1872 the action was tried and judgment given in favor of the plaintiff; and in February, 1877, some five years after the entry of judgment in the action, a motion to vacate the order of arrest was renewed, and denied. In denying the same the judge holding the Special Term stated the following grounds:

"First. The leave given to renew the motion was not intended to enable the defendant to renew it after the entry of judgment, nor after the lapse of so many years.

"Second. Assuming the motion to be properly before the court, it should, in my opinion, be denied on its merits."

We think the first of these objections was sufficient to justify the denial of the motion. Section 204 of the Code provides that a defendant arrested may, at any time *before judgment*, apply on motion to vacate the order of arrest. Under this section it has been frequently held that the application must be made before judgment. (*Barker v. Wheeler*, 23 How., 193; *Roberts v. Carter*, 17 id., 479; *Union Bank v. Mott*, 9 Abbott, 106, 107.) The application in this action was made before judgment and was denied; but leave to renew was given for a special purpose, to wit, to enable the defendant to show that the claim, or some portion of it, was secured by attachment, on the ground that if secured in whole or in part, the order of arrest might be vacated or the amount of bail reduced. Several years elapsed before judgment was obtained, during which a motion might, for all the purposes for which the leave to renew was given, have been easily made. The defendant, however, has delayed until several years after the judgment was entered, and we think it must be held that his right to renew the motion was completely terminated by the judgment.

We refrain, therefore, from examining the merits of the motion, as we think this objection ought to be fatal; and our examination

of the question upon the merits might be drawn into a precedent for similar experiments.

The order should be affirmed, with ten dollars costs and disbursements.

BRADY, J., concurred; INGALLS, J., taking no part.

Order affirmed, with ten dollars costs and disbursements.

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WILLIAM L. SKIDMORE, AS RECEIVER, ETC., AND AS SPECIAL GUARDIAN, ETC., PLAINTIFF, v. JOSEPH HART, DEFENDANT.

*Taxes in New York—when they become a lien—covenant for payment of.*

On March 30, 1875, certain premises in the city of New York were leased to the defendant for ten years from May 1, 1875, the latter agreeing, during the term of the lease, to pay and discharge all such assessments, extraordinary as well as ordinary, as should be levied, assessed, imposed or grow due and payable upon, out of or for the demised premises, and all parts thereof.

In New York the assessment rolls are open for examination from the second Monday in January to April thirtieth, and are returned to the board of supervisors on the first Monday of July in each year, and the amount of the tax is thereafter set down opposite to the items of real and personal property on the list. *Held*, that the tax for the year 1875 grew due and became payable after the commencement of the term and that the defendant was bound to pay the same.

CONTROVERSY submitted without action upon an agreed statement of facts.

The action was brought to recover the amount of a tax paid by the plaintiff upon certain premises leased to the defendant.

The plaintiff, on the 30th day of March, 1875, leased to Joseph Hart the lots of land and premises in the Twentieth ward of the city of New York, known as Nos. 545 and 547 Sixth avenue and two lots in the rear thereof and adjacent thereto in the center of the block, subject to the terms, conditions and covenants of the lease, for the term of ten years from the 1st day of May, 1875, for the annual rent of \$8,500, which lease also contained the following covenant: "The said party of the second part, his heirs, executors,

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administrators or assigns, shall and will, at his or their own proper costs and charges, bear, pay and discharge all such Croton water rents, and also such taxes and assessments, extraordinary as well as ordinary, as shall, during the term hereby granted, be levied, assessed, imposed or grow due and payable upon, out of or for the said demised premises and all parts thereof, as the same now exist or may hereafter be imposed, in accordance with the terms of this lease, by virtue of any present or future law of the United States of America, or of the State of New York, or of the corporation of the city and county of New York, or of either of them, or of any legal proceedings or lawful authority whatever, when and as the same shall become due and payable."

The said Joseph Hart entered upon, and took possession of, said premises under said lease on the 1st day of May, 1875, at twelve o'clock, noon, of that day and has ever since been, and now is, in possession of the same as the tenant thereof.

Pursuant to the laws relative to taxation in the city and county of New York the commissioners of taxes, upon the delivery of the assessment roll to them, published due notice thereof and the same was open for examination and correction from the second Monday in January, 1875, up to and including the 30th day of April, 1875; and during said period the said commissioners heard and determined any and every application, made by any person considering himself aggrieved by any assessed valuation of his real or personal estate, to have the same corrected. And after said last-mentioned date, and on the 1st day of May, 1875, the said commissioners prepared a copy thereof and on the 3d day of July, 1875, they certified, according to law, that the same was a copy of the corrected assessment roll of the Twentieth ward and delivered the same to the supervisors of the city and county of New York, who, thereupon, on the 22d day of July, 1875, fixed and determined the rate of taxation thereon, and confirmed the same and delivered the said corrected assessment roll to the receiver of taxes for the collection of the several sums therein named.

The plaintiff paid the tax assessed against the premises for that year, which sum, with interest thereon from the date of its payment, he now claims to recover.

*Francis N. Shepard*, for the plaintiff. The tax of 1875 did not exist at the time the lease to the defendant took effect. (Laws of 1859, chap. 678, § 12; *Van Rensselaer v. Whitbeck*, 7 N. Y., 521, 522; *Rundel v. Lakey*, 40 id., 517; *Westfall v. Preston*, 49 id., 353, 354.) The completion of the assessment roll before the lease took effect would have created no lien nor rendered plaintiff liable. The assessment roll forms the basis on which the tax is imposed. It is, in no sense, the imposition of a charge upon the land. (*Barlow v. St. Nicholas Nat. Bank*, 63 N. Y., 399.) The defendant did not contemplate the existence of a lien upon the land before the lease took effect by reason of the completion of the assessment roll. (*Kern v. Townsley*, 45 Barb., 150, approved; *Dowdney v. The Mayor, etc.*, 54 N. Y., 188; *Barlow v. St. Nicholas Nat. Bank, supra.*) The defendant in covenanting to pay taxes contemplated the payment of money, and the time when the tax accrued must be deemed to be when money became payable for it. (*Giles v. Austin*, 62 N. Y., 493.)

*H. P. Townsend*, for the defendant. At the time of the commencement of the term of the lease, the 1st day of May, 1875, the assessment, with respect to the premises embraced in the lease as against the owner or his representative, the plaintiff or the occupant thereof, had been judicially and conclusively determined and fixed. Such determination established the liability of such owner, plaintiff or occupant to pay said taxes whenever computed. (*Rundell v. Lakey*, 40 N. Y., 513; 1 R. S. [5th ed.], 913; Laws of 1859, chap. 302, § 11, p. 682.) It is the person of the owner, his representative or occupant of the land that is assessed, but the amount he is assessed is determined by the value of the land. Being occupied, or the owner or representative being a resident, the assessment must be against such occupant, owner or representative by name. (1 R. S. [5th ed.], 908, §§ 1, 2, 8, 9, 10; Laws of 1859, chap. 302, § 7, p. 680; *Whitney v. Thomas*, 23 N. Y., 285; *Rundell v. Lakey*, 40 id., 517; *Litchfield v. McComber*, 42 Barb., 295.)

BRADY, J.:

The defendant, by lease dated March 30, 1875, secured certain property for a term of ten years, commencing on the 1st of

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May, 1875, and agreed, during the term demised, to bear, pay and discharge all such taxes and assessments, extraordinary as well as ordinary, as should be levied, assessed, imposed or grow due and payable upon, out of, or for, the demised premises and all parts thereof as the same then existed, or might thereafter be imposed in accordance with the terms of the lease, by virtue of any present or future law of the United States of America, or of the State of New York, or of the corporation of the city and county of New York, or either of them, or by other legal proceedings or lawful authority whatever, when and as the same should become due and payable.

The taxes for the year 1875 had not, on the first of May aforesaid, been determined. The obligation resting upon the land to discharge them or to incur the burden of a lien for the amount, so to speak, existed at the time the lease was executed, but they had not then been imposed, because the amount was not ascertained. They had not, therefore, been assessed; they had not grown due and payable and could not be levied therefore out of the demised premises. The preliminaries to the collection of the taxes were not and could not be completed, until the action of the board of supervisors in the month of July following the commencement of the term when the rolls received from the assessors by the commissioners of taxes and assessments must be sent to the board of supervisors, a ceremony which takes place on the first Monday of July in each year (Laws of 1859, chap. 302, § 13). The supervisors are then required by law to place opposite to the several sums set down as the valuation of the real and personal property on the rolls, the respective sums in dollars and cents to be paid as a tax thereon, rejecting the fractions of a cent (Laws of 1850, chap. 121, § 25). It follows as a necessary sequence that the amount of the tax was unknown when the term began, and could not have been known until the month of July following. It would have been impossible, therefore, for the lessor to have paid them, or to have determined what the amount would be.

It seems to be quite apparent, that the taxes having thus been ascertained subsequent to the commencement of the term, they grew due and became payable after the term commenced, and were within the operation of the covenant on the part of the defendant,

and by which we have already seen he promised to discharge all taxes and assessments which should, during his term, be levied, assessed, imposed or grow due. The question thus discussed seems to be determined in favor of the plaintiff by two cases in the Court of Appeals. (*Dowdney et al. v. The Mayor*, 54 N. Y., 186; *Barlow et al. v. The St. Nicholas Bank*, 63 id., 399.) It was expressly held in the latter case that the entry of land in an assessment-roll did not constitute an incumbrance thereon, and the assessment or the subsequent levying of the taxes thereon was not a breach of covenant against incumbrances contained in the deed, executed after the completion of the assessment-roll and before the levying of the taxes, and it is said in that case that the assessment is the basis upon which the board of assessors act in apportioning the taxes, but it is in no sense imposed as a charge upon the land described in the roll. It is one of the preliminary steps which result in taxation. It is further said in that case, and properly, that the roll when complete fixes the valuation of the property to be taxed, but it does not determine the amount of the taxes, and the most which can be claimed is, that it renders more definite and certain the liability to taxation which nevertheless existed before the assessment was made. The cases are analogous, but the covenant of the defendant is broader than the covenant against incumbrances, because it assumes the payment of all such taxes and assessments as shall be levied, assessed, imposed, grow due and become payable. The plaintiff, for these reason, is entitled to judgment.

DAVIS, P. J., and INGALLS, J., concurred.

Judgment ordered for the plaintiff.

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48ad303JACOB H. HERRICK, APPELLANT, v. ADON SMITH, JR.,  
RESPONDENT.*Witness — impeachment of — when prior declaration of witness may be proved, for the purpose of sustaining his testimony.*

In this action, brought for a partnership accounting, the defendant claimed that the accounts had been settled by an accord and satisfaction. The parties themselves were the principal witnesses and gave contradictory evidence. The defendant to impeach plaintiff's testimony denying the settlement, gave evidence to show that at the time of the settlement, plaintiff thought that defendant's father, a man of wealth, intended to leave his property to defendant in trust and not absolutely; and that subsequently, upon learning that the property was left to defendant absolutely, so that defendant was pecuniarily responsible, he denied the settlement. Upon the trial the plaintiff offered to prove by a witness that he had denied that any settlement had been made before he knew the contents of the will of defendant's father.

*Held*, that the evidence was proper as tending to show that the plaintiff had denied the settlement, at a time when he could not have been impelled so to do by a knowledge of the change in defendant's pecuniary condition.

Where an attempt is made to discredit a witness on the ground that when his testimony is given his interests prompt him to make a false statement, he may show that he made similar statements at a time when he had no advantage to derive from so doing.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

*William A. Beach*, for the appellant. It was error in the court upon the trial at Special Term to exclude the evidence offered, of statements by plaintiff, in regard to the indebtedness of the defendant to the firm, made to Mr. Camp and to Mr. Allen after the 5th day of February, 1874, and the time of the alleged settlement, and before the 24th day of March, 1874, the date of the death of Adon Smith, senior. (*The People v. Vane*, 12 Wend., 78; *Robb v. Hackley*, 23 id., 50; *People v. Finnegan*, 1 Parker's Crim. Rep., 147; *Smith v. Stickney*, 17 Barb., 489; *Railway P. A. Co. v. Warner*, 62 N. Y., 651; S. C., 1 Weekly Dig., 204; *Hotchkiss v. Germania Fire Ins. Co.*, 5 Hun [12 Sup. Ct.], 90; Starkie on Evidence, 353; 1 Phillips on Evidence, 814, 974; 1 Greenleaf on Evidence, § 469; 2 Taylor on Evidence, § 1330.)



*John E. Parson*, for the respondent.

BRADY, J.:

This action is to recover a balance alleged to be due to the plaintiff on the partnership accounts between him and the defendant. The latter, in answer to the claim, set up as one of his defenses a settlement, an accord and satisfaction accomplished by the release of a note held against the firm by his father, and by the execution, also, by his father, of a note for \$4,500; the object of which was to enable the firm to compromise with their creditors, and thus to avoid proceedings in bankruptcy. The defendant, as he alleges, was unwilling at first to ask his father to make the note of \$4,500, but urged thereto by the plaintiff, finally yielded, and after some trouble succeeded in getting it. It was obtained and given, and the release or surrender of the other note, as against the firm, also consented to, in consideration of the agreement that it would be a full settlement of all partnership transactions between the defendant and the plaintiff. In other words, an accord and satisfaction, founded upon the consideration thus paid by a stranger, for the defendant's benefit. The parties, in their evidence, stood *vis a vis* on this subject, and their testimony was irreconcilable.

It appeared, however, upon the trial, that the defendant's father was dead, and that the plaintiff supposed that the defendant's share of his father's estate, who was a man of wealth, would be given to him by trust and not absolutely. It also appeared that the plaintiff, having obtained a copy of the will, learned that this was an erroneous view of the subject, and that he then determined to press his claim which he had not previously sought to enforce.

The proof of these facts, extracted from the plaintiff by the examination of the counsel for the defendant, gave rise to a suspicion or imputation that the prosecution of the demand resulted from the discovery mentioned, and that the denial of the settlement was also prompted by it. The possession of means to pay had, in other words, recreated or revived, or both, a claim which had been settled, and which was by a favorable change in the defendant's condition, valuable if it could be maintained.

The testimony, as stated, in reference to the settlement, was conflicting, and the parties were substantially the only witnesses. The

seeming presence of an apparent motive to misrepresent, namely, the ability of the defendant to pay, having thus confronted him, the plaintiff offered to show that *before the death of the defendant's father* and soon after the transactions between the parties in reference to their copartnership, he had stated to the witnesses named, that there had been no settlement; and thus he designed to relieve himself from the odium of the bad motive or imputation mentioned. The testimony was rejected and exception was taken; and thus is presented an important question, which if decided in favor of the plaintiff, disposes of this appeal.

Was the evidence admissible? The authorities are not in discord upon the proposition, that special circumstances may require the admission of such testimony, and that they do exist where a design, resting on facts proved may be imputed, to misrepresent from some motive of interest; in which case, in order to repel the imputation, it is proper to show a similar statement when the supposed motive did not exist, or when motives of interest would have prompted a different statement of facts. This view is sustained by the text books. (Starkie on Evidence, 353; Phillips on Evidence, 307, 308; 1 Greenleaf on Evidence, § 469; 2 Taylor on Evidence, § 1330.) And the subject is also elaborately considered and the principles declared in *Robb v. Hackley* (23 Wend., 50); it is reasserted in *Smith v. Stickney* (17 Barb., 489); again in *Hotchkiss v. The Germania Fire Insurance Company*, (12 N. Y. Sup. Ct., 90), and by MILLER, J., in *Railway P. A. v. Warner* (62 N. Y. 651), although the latter case is only reported in memoranda, because a majority of the whole court did not concur. Justice MILLER said: "As a general rule, such evidence is inadmissible, as the witness cannot be allowed to corroborate his statement in court by what was said by him out of court. *There are, however, exceptions to this rule, in case an attempt is made to discredit the witness on the ground that his testimony was given under the influence of some motive prompting him to make a false or colored statement, then, he may be allowed to show in reply, that he has made similar declarations at a time when the motive imputed to him did not exist.*

The testimony thus rejected is correctly said to be dangerous, and is to be accepted only under circumstances special in character, and then but for the purpose of corroborating the statement made

upon the witness' stand. The design of the rule is to enable the witness to relieve himself from an apparently dishonest motive, or imputation, in order that his testimony may not be unjustly criticised or discredited. It primarily affects his credibility only. If a motive or imputation be asserted or charged, and the parties are substantially the only witnesses to a particular, important and necessary fact, the former statement, in corroboration, may assist in the administration of justice. The guards placed about the application of the rule and the limit of its sphere, would seem to remove from it the dangerous consequences which the courts have apprehended. In this case the necessary elements are presented, and the evidence should have been received. For that reason the judgment should be reversed and a new trial granted, with costs to abide event.

DAVIS, P. J., and INGALLS, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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MARIA S. MOFFATT AND DAVID B. MOFFATT, RESPONDENTS, v. ZILLAH McLAUGHLIN IMPEADED WITH ALFRED McLAUGHLIN, APPELLANT.

*Action of partition — allegations of complaint — Rule 78 of 1876 — demurrer.*

In an action for partition, in which one of the defendants was an infant, the complaint alleged that the land therein described was the only real estate owned in common *by the defendants*. The defendant demurred on the ground that it was not averred that the lands described in the complaint were the only lands owned in common *by the parties* as required by Rule 78 of the Rules of 1876.

*Held*, that the demurrer was properly overruled; that if the allegation was defective it was because of its uncertainty and the remedy was by motion and not by demurrer.

APPEAL by defendant, Zillah McLaughlin, from an order overruling defendant's demurrer to the complaint. The defendant Alfred McLaughlin was an infant at the time of the commencement of the action.

*M. B. Field*, for the appellant.

*S. K. & F. B. Wightman*, for the respondents.

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BRADY, J. :

This is an action for partition and one of the defendants is an infant. The complaint alleges that the land described is the only real estate owned in common by the defendants. The defendant Zillah McLaughlin demurred upon the ground that the complaint did not state facts sufficient to constitute a cause of action, and this proposition rests upon the ground that it should appear by proper averment that the lands described are the only lands owned in common by the parties as required by Rule 78 of this court, in force prior to January 1, 1878. The pleader, it will be perceived, averred the lands to be the only real estate owned in common by the defendants, instead of alleging that it was the only real estate owned by the parties. The demurrer was overruled, and properly.

The averment made was an attempt to conform to the rule mentioned, and the reasoning of the learned justice who presided at Special Term shows that the demurrer was not the mode of procedure, if the defendant demurring felt aggrieved. It was asked by him, "if the allegation referred to was true, how could the defendants own other lands in common with the plaintiff," and this demonstrated that the allegation, if assailable, was on account of its uncertainty only. The remedy was to make it more certain and definite. The imperfect averment of a material fact is not cause for demurrer. If the intention of the pleader is apparent, but the phraseology doubtful in effect, the remedy is by motion and not by demurrer.

It was clearly the intention of the pleader herein to conform to the rule, and perhaps logically he did so. It is unnecessary, however, to pursue the subject further. The order appealed from was right, and should be affirmed with ten dollars costs.

INGALLS, J., concurred.

DAVIS, P. J.:

I concur, except as to costs, which are not in such appeals limited to ten dollars.

Order affirmed with ten dollars costs

ANNE STALLKNECHT, AS ADMINISTRATRIX OF CHARLES  
STALLKNECHT, DECEASED, RESPONDENT, v. THE PENN-  
SYLVANIA RAILROAD COMPANY, APPELLANT.

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*Statutes giving right of action for negligent killing — in what States, and by whom it can be enforced.*

This action was brought to recover damages arising from the death of plaintiff's intestate, in the State of New Jersey, occasioned by the negligence of the defendant, a foreign corporation. At the time of the accident there was in force in the State of New Jersey a statute, similar to that of this State, giving to the personal representatives of the person killed by the negligence of any person a right of action for the damages occasioned thereby. The plaintiff was appointed administratrix by the surrogate of New York.

*Held*, that the right of action given by the New Jersey statute could be enforced in the courts of this State by an administratrix appointed in this State.

APPEAL from an order overruling a demurrer interposed to the complaint.

On April 6, 1875, one Charles Stallknecht, plaintiff's intestate, who was then in the employment of the defendant, was killed by a collision on its railroad near Millstone, New Jersey. On September 23, 1875, the surrogate of the county of New York issued letters of administration to the plaintiff who, thereupon, brought the present action. The defendant demurred to the complaint. Upon the trial Mr. Justice VAN BRUNT overruled the demurrer, and from that decision the present appeal is taken.

*John M. Scribner*, for the appellant. No action can be maintained in this State by an administrator appointed under the laws of New York, to recover upon a cause of action not existing at common law but created by the New Jersey statute set forth in the complaint. (*Mackay, Admr., v. Cen. R. R. of N. J.*, per SHIPMAN, J. [MS.].) The same question has been passed upon in several other States. (*Richardson v. N. Y. Cen. R. R. Co.*, 98 Mass., 85; see, also, Revised Statutes of New York, 2 R. S., 73, § 23, p. 75 [Edm. ed.].) The accident by which Mr. Richardson was injured happened in 1865. At that time there was a statute in Massachusetts

giving a remedy in such a case. (Gen. Stat. Mass. [1860], 794, § 34; Sherman & R. on Neg., § 294; *Woodward v. Mich. So. and Northern Ind. R. R. Co.*, 10 Ohio State Rep., 120; *Needham, Admr., v. Grand Trunk Railway*, 38 Vermont, 294; *State* [use of Allen] *v. Pittsburgh, etc., R. R. Co.*, 45 Maryland Rep., 41.) At the time of these decisions the statutes of Ohio, Illinois, Vermont and New Jersey, were substantially like the statute of this State. That the plaintiff cannot recover on the facts alleged in her complaint is also established by the decisions of our courts, that a New York administrator cannot recover, even under the statute of New York allowing compensation to the widow and next of kin of a person whose death has been caused by wrongful act, neglect or default (chap. 450, Laws 1847), where the injury resulting in death occurred without the State. (*Beach v. Bay State Co.*, 10 Abb., 71; S. C., 30 Barb., 433; *Whitford v. Panama R. R. Co.*, 23 N. Y., 465; S. C., 3 Bosw., 67; *Crowley v. Panama R. R. Co.*, 30 Barb., 99.)

*Clifford A. H. Bartlett*, for the respondent. It has been held by the courts of this State that an action of this character could be maintained on a foreign statute similar to our own. (*Whitford v. The Panama R. R.*, 23 N. Y., 474; S. C., 3 Bosw., 17 and 83; *Van Buskirk v. Warren*, 41 id., 131; 27 Barb., 246.) It is not requisite to the maintenance of this action that letters of administration should have been taken out in the State where the cause of action arose. (*Kansas Pacific Railway Co. v. Lydia H. Cutter, Administratrix*, 16 Kansas; *Jeffersonville, Madison and Indianapolis R. R. Co. v. Hendricks, Administrator*, 41 Indiana, 73.)

BRADY, J.:

The intestate was in the employment of the defendant, and while so engaged was killed on the line of their road or route and in the State of New Jersey. It does not appear, by express averment, whether or not he was a resident of this county at the time of his death, but the presumption must be that he was, inasmuch as letters of administration were granted of his effects. When the collision occurred by which the intestate was deprived of his life, there existed in this and in the State of New Jersey, a statute which gave to the personal representatives of the person killed a right of action for dam-

ages resulting from death if caused by negligence. When the death occurred, if caused by negligence, a right of action instantly accrued to the personal representatives, whoever they might be, and this right being personal in character followed the rule of the common law and could be enforced wherever jurisdiction of the wrong done could be acquired. In the following cases, *Beach v. The Bay State Company* (30 Barb., 433); *Crouley v. Panama Railroad Company* (30 id., 99), cited on behalf of the defendant, the effect of a corresponding statute in the respective States was not considered or suggested, but in *Whitford v. Panama Railroad Company* (23 N. Y., 474), it was, and the intimation of the court was decidedly in favor of the right of action as a consequence. It is not doubted in any of these cases, that if the right of action existed by the common law it could be enforced in all States where the common law prevailed, and the doctrine rests on the proposition that the law is the same in each sovereignty. When instead of the common law we have kindred statutes, the principle exists, from which, in the realm of the common law the right of action springs, and the rules of that realm are applicable in the enforcement of the right. When, therefore, the plaintiff was appointed administratrix she became the representative of the right and could enforce it here if, by the process of our courts, we could obtain jurisdiction over the defendant. This was possible and was accomplished.

The question presented does not involve the doctrine of *ultra vires* in any form. If a right of action exists and attaches to the person who seeks to enforce it, and it is not local in character, the courts are open for the remedy, and in this case the cause of action having been created by the law of New Jersey and conferred upon the personal representatives of the person killed, and she presenting her claim, this court is open to her for redress. In granting her the aid of our jurisdiction, we are not subjecting the defendant to an action under our statutes for injuries done in another State, but for the enforcement of a right of action created by another State and conferred upon persons dwelling within our own.

None of the cases in our courts are in conflict with this view, and on principle, they could not well be and stand the test of examination.

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FIRST DEPARTMENT, MARCH TERM, 1878.

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The order appealed from should, for these reasons, be affirmed with ten dollars costs, and the disbursements of this appeal.

DAVIS, P. J., and INGALLS, J., concurred.

Order affirmed, with ten dollars costs and disbursements.

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THOMPSON J. S. FLINT, RESPONDENT, v. FRANCIS BACON  
AND OTHERS, TRUSTEES, ETC., OF AUGUSTUS HEMENWAY,  
DECEASED, AND CHARLES P. HEMENWAY, APPELLANTS.

*Easement — right of drainage — what words are sufficient to create.*

Previous to November 1, 1861, one Dowley was the owner of, and had built houses upon lots Nos. 31, 33, 35 and 37 Broadway, New York, the drainage from Nos. 31 and 33 being conducted into and through a pipe passing through lots 35 and 37. November 1, 1861, Dowley, by a deed containing covenants of warranty and for quiet enjoyment, conveyed the lots 31 and 33 to M., "as the same are now built upon and in the occupancy of the said party of the second part," "to have and to hold the same with the appurtenances." On November 25, 1861, D. conveyed lots 35 and 37 to one H., "as the same are now inclosed, built upon and occupied." H. had no actual knowledge that the drain-pipe from M.'s premises ran through his, and the same was not observable upon ordinary inspection.

*Held*, that the premises conveyed to H. were subject to an easement in favor of M., to use the pipe laid therein for the purpose of drainage.

The mere fact that one having, for his building as then occupied, a right of drainage under the lot of another, increases largely, by reason of changes in the use of his building, the amount of refuse matter discharged into, and passing through such drain, does not affect his right to enjoy such easement where the passage through such drain is not obstructed nor the drain injured by such increased use thereof.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

The action was brought to prevent the defendant from obstructing a drain which ran from the premises of the plaintiff, Nos. 31 and 33 Broadway, to and through those of the defendant, Nos. 35 and 37 Broadway, New York. The latter denied any right in the plaintiff to use such drain and further claimed, among other things, that the plaintiff had so altered the use to which his premises were applied and increased the amount of his sewage as to have



destroyed his easement, if he ever possessed one. With reference to this the court found that Flint, soon after entering into the possession of 31 and 33, changed, to some extent, the interior construction thereof from warehouses and counting-rooms to offices, and increased the number of water-closets from four to seventeen, and the number of rooms for tenants from two counting-rooms and warehouses to some twenty-four rooms, in which condition the said premises had since been and were at the time of the trial.

That one of the tenants of said Flint had used, for some process of wine manufacture, a ground marble dust which, in small quantities, had passed off through the pipes of 31 and 33 into the drain and so been discharged with other refuse material, but the same had never obstructed the free passage through said pipes or drain nor injured the same, nor had there ever been any choking or obstruction of said pipes or drain, except the one which occurred in the winter of 1869-70, from a dislocation thereof.

*Edgar S. Van Winkle*, for the appellants. When the original owner of two pieces sells one with an easement in its favor as against the other, then sells the other piece but says nothing of the easement in either deed, and the easement does not appear at the time of the sale, that is, is not visible, then the grantee of the second piece takes his land free and discharged of the easement. (*Lampman v. Milks*, 21 N. Y., 505; *Butterworth v. Crawford*, 46 id., 349; *Curtis v. Ayrault*, 47 id., 75; *Onthank v. Lake Shore and M. S. R. R. Co.*, 15 Hun, 131.) Flint cannot change the condition of the land from what it was at the time it was sold by the owner of the two tenements. (*Lampman v. Milks*, 21 N. Y., 505; *Curtis v. Ayrault*, 47 id., 73; Washburn on Easements, chap. 1, § 322; Domat, 616 [Cushing's ed.].)

*Luther R. Marsh*, for the respondent. The right to the servitude passed by the conveyance of the dominant estate, not only by implication but by the express terms of the conveyance. (*Nicholas v. Chamberlain*, Cro. Jac., 121; *Lampman v. Milks*, 21 N. Y., 505; *Watts v. Kelson*, 6 Ch. App. Cases [L. R.], 166, 174; *Comstock v. Johnson*, 46 N. Y., 615, 620; *Woodhull v. Rosenthal*, 61 id., 382, 389, 390; *Philbrick v. Ewing*, 97 Mass., 133, 134, 135; *United*

*States v. Appleton*, 1 Sumner, 502; *Seymour v. Lewis* 2 Beaseley [New Jersey] Ch. R., 439, 443, 444; *Roberts v. Roberts*, 55 N. Y., 275, 277; *Seymour v. Canandaigua R. R. Co.*, 25 Barb., 284, 301; S. C., 14 How. Pr., 531; *Mason v. White*, 11 Barb., 173; *Simons v. Cloonan*, 47 N. Y., 9; *Hills v. Miller*, 3 Paige Ch., 254, 256.)

INGALLS, J.:

This action was instituted by the plaintiff to restrain the defendants from obstructing the drainage, from the premises of the plaintiff through the premises of the defendants, to the public sewer.

After a trial at Special Term the injunction which had been previously granted was continued, and judgment entered accordingly, from which the defendants appeal. Previous to November 1, 1861, Levi A. Dowley was the owner of land situated in the city of New York, known as lots Nos. 31, 33, 35 and 37 on Broadway. He erected thereon the buildings in question and located drain pipes connecting them with the public sewer. The drainage from lots 31 and 33 was conducted into and through a pipe passing through lots 35 and 37. On the 1st of November, 1861, Dowley conveyed lots 31 and 33 to Henry Mariet, by a deed which contained a covenant of warranty, and also a covenant for quiet enjoyment. The deed contained the following: "As the same are now built upon and in the occupancy of the said party of the second part," "to have and to hold the same with the appurtenances." This deed was recorded the same day it was executed. Mariet and wife conveyed the same premises to Thompson J. S. Flint, the plaintiff, on the 31st day of March, 1863, by deed which contains the following provision: "As the same are now built upon and in the occupancy of the said party of the first part, together with all and singular the tenements, hereditaments and appurtenances thereto belonging."

On the 25th of November, 1861, Dowley and wife conveyed lots 35 and 37, to Augustus Hemenway, the testator of the defendant, which deed contains the following: "*As the same are now inclosed, built upon and occupied.*"

When Dowley conveyed to Mariet, he knew precisely the condition of the premises, and made the conveyance accordingly, and the language of the deed above stated, shows that he intended that

his grantees should receive the premises, with the easement, namely the right of sewerage through the portion of the land reserved by Dowley. It is quite evident from an inspection of the deed to Hemenway that Dowley intended to convey to him lots thirty-five and thirty-seven, subject to such easement. Doubtless he might have employed more apt words to convey such intention. The words, "*As the same are now inclosed, built upon and occupied,*" incorporated in a deed, could not fail to arrest the attention of a reasonably careful man, and suggested an inquiry in regard to such occupancy, as to its nature and extent. (*Nicholas v. Chamberlain*, Cro. Jac., 121; *Lampman v. Milks*, 21 N. Y., 505; *Woodhull v. Rosenthal*, 61 id., 382; *Roberts v. Roberts*, 55 id., 275.)

The phraseology of the deed from Dowley to Mariet, which was recorded when Hemenway purchased, should also have put him on inquiry in regard to the manner the premises were occupied. In purchasing property situated in a populous city, it would seem that the subject of sewerage, would be most likely first to attract the attention of a purchaser, and that a slight intimation would put him on inquiry in regard thereto.

Considering the form of the several conveyances, the situation of the premises, and the relation of the parties, we are of the opinion that the defendant's acquired their title subject to the right of sewerage, as the same was, substantially, possessed and enjoyed by Mariet, at the time of the conveyance to Augustus Hemenway. The case of *Butterworth v. Crawford* (46 N. Y., 349), does not, in our judgment, conflict with the views expressed above, when applied to the facts of this case. It is true the court in this case, finds as a fact, that the defendants had no actual knowledge that the drain pipe from the plaintiff's premises entered the defendant's premises, and that it was not observable upon ordinary inspection. Yet we deem such finding not conclusive upon the rights of the plaintiff, when considered in connection with the other facts of this case.

The appellant further insists, that if any such right was ever possessed by the plaintiff, the same became forfeited, in consequence of the manner the plaintiff exercised the same; that he has abused such right to such an extent, as should deprive him altogether of any enjoyment thereof. The court finds that no injury has arisen in this respect from the manner the plaintiff has used his premises.

Such finding is as follows : " But the same has never obstructed the free passage through said pipes or drain, nor injured the same, nor has there been any choking or obstruction of said pipes or drain, except the one before mentioned, as occasioned in the winter of 1869-70, from the dislocation aforesaid."

The manner of such use has not been changed ; it has been increased, but within the capacity of the conduit. A question of this nature, when applied to the use of property in such a city where changes become necessary, from various causes, in the use of buildings, must necessarily be regarded by the courts with reasonable liberality. Especially so, when it affirmatively appears, that no injury has arisen from such use.

In regard to the question of costs, it was matter of discretion with the trial court, with which this court should not interfere, but as to the costs of the appeal the appellant should pay them, as he fails upon the entire case here presented.

The judgment must be affirmed with costs.

BRADY, J., concurred ; DAVIS, P. J., not sitting.

Judgment affirmed, with costs.

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SARAH CURRIN AND OTHERS, APPELLANTS, v. PATRICK S. FANNING AND OTHERS, RESPONDENTS.

*Surrogate of New York — power to construe wills — chap. 359 of 1870 — devise to corporation — power to hold in trust.*

A testator devised certain real estate to the trustees of Manhattan College, in the city of New York, and their successors forever, in trust to receive the rents, etc., and to apply the same to the use of said Manhattan College for the following purposes, to wit, to found and maintain a Latin professorship. The foregoing devise was made to the trustees on the express condition that out of the rents, etc., the said trustees and their successors should pay to the testator's wife an annuity of \$1,500 per annum, and authorized them, after the death of the wife, to sell and reinvest the proceeds, the income to be applied to the maintenance of the professorship.

Upon an application to the surrogate of New York to admit the will to probate, held, that under chapter 359 of 1870 the surrogate of New York had power to pass upon the validity of any of the provisions of said will which should be

contested, and pass upon their construction or legal effect when called in question by any of the heirs, next of kin, legatees or devisees as amply and conclusively as the Supreme Court might do.

That such jurisdiction should not be exercised, except so far as it might be necessary for the purpose of passing upon the probate of a will, until all the parties in interest were brought into court.

That the devise of the real estate was, in legal effect, to the Manhattan College and not to the trustees as individuals.

That the college being capable of taking real estate by devise was authorized to take the property, although charged with a subordinate trust in favor of the widow of the testator.

*Semble*, that the act (chap. 319 of 1848) restricting devises and bequests to certain corporations to one-fourth of the testator's estate, and to such as are made two months before the death of the testator, is not applicable to an institution such as Manhattan College. If it were applicable, the prohibition is repealed by chapter 360 of 1860.

*Semble*, that in determining the one-half of the estate which under the act of 1860 can be devised to charitable or educational corporations, the widow's dower and the debts are to be first deducted.

APPEAL from the decree of the surrogate of the city and county of New York admitting to probate the will of Edward Isidore Sears, and giving a construction to certain portions thereof.

*D. McL. Shaw*, for the appellants. The devise was to the trustees, as individuals, for the benefit of the college and is, therefore, void. It contravenes the statute forbidding the suspension of the power of alienation for more than two lives in being; in other words it creates a perpetuity in trust. (*Owens v. Missionary Society*, 14 N. Y., 380; *Harris v. Clark*, 3 Seld., 242; *Holmes v. Mead*, 52 N. Y., 332; *Van Schuyven v. Mulford*, 59 id., 426; *Levy v. Levy*, 33 id., 137.) The trustees may or may not, after Mrs. Sears' death, execute the power. That they may not do so is as fatal as if they were expressly forbidden to do so. (*Jennings v. Jennings*, 7 N. Y., 547; *Amory v. Lord*, 9 id., 403; *Schettler v. Smith*, 41 id., 328; *Scott v. Monell*, 1 Redf., 431; *Tucker v. Tucker*, 5 N. Y., 408.) There is nothing in the character of the devise which prevents the statutory condemnation from attaching to it. The rule applies to devises and bequests to charitable uses (*Adams v. Perry*, 43 N. Y., 499; *Bascom v. Albertson*, 34 id., 584), and to trusts (*Coster v. Lorillard*, 14 Wend., 265; *Tucker v. Tucker*, 5 N. Y., 108; *Yates v. Yates*, 9 Barb., 324) and to powers in trust (*Hone v. Van Schaick*,

20 Wend., 564). The trust being void the whole devise falls with it. It is impossible to sustain it for the benefit of the widow and to destroy it for the benefit of the college. The one cannot be separated from the other. (*Craig v. Hone*, 2 Edw. Ch., 554; *Thompson v. Clendinning*, 1 Sandf. Ch., 387; *Moore v. Moore*, 47 Barb., 257; *Beekman v. Bonsor*, 23 N. Y., 298, 575; *Knox v. Jones*, 47 id., 389.) The whole devise fails because the court cannot substitute a trustee. Here the trustee is in being but cannot take. There is no valid investiture of the legal title and so no use can be raised at all, for the devise is coupled with a condition which makes it impossible for the estate to vest where the testator intended it should be vested. (*Sherwood v. American Bible Society*, 1 Keyes, 566; *Owen v. Missionary Society*, 4 Kern., 406; *Downing v. Marshall*, 23 N. Y., 366; *Harris v. Clark*, 3 Seld., 242; *Holmes v. Mead*, 52 N. Y., 332.) The devise being an entire one and void there is vested in the heirs a fee subject to the widow's right of dower. There is no residuary clause in the will. (*Coster v. Lorillard*, 14 Wend., 364; *Ransom v. Lampman*, 5 N. Y., 456; *Van Kleeck v. Ref. Dutch Ch.*, 20 Wend., 469.)

*Chas. E. Miller*, for the respondents. The devise in the seventh clause of the will to the trustees of Manhattan College, in the city of New York, and their successors forever, is a devise to the college itself. (*N. Y. Inst. for the Blind v. How's Ex.*, 10 N. Y., 84, and cases cited; *Bailey v. Onondaga County Mut. Ins. Co.*, 6 Hill, 476; *N. Y. African Society v. Varick*, 13 Johns. R., 38; *Manice v. Manice*, 43 N. Y., 387; *Atty.-Gen. v. Tancred*, Ambler R., 351; *Christ's College, Cambridge*, 1 Wm. Blackstone R., 90; *Consistory Ref. Dutch Ch. v. Brandow*, 52 Barb., 228; *Atty.-Gen. v. Tancred*, 1 Eden., 10.) The college has the legal capacity to execute the trust in favor of the widow contained in the will. (*In the Matter of Howe*, 1 Paige, 214; *Tinkham v. Erie Railway Company*, 53 Barb., 393, 395; *Perry on Trust*, § 44; 12 Mass. Rep., 564; *Vidal v. Girard*, 2 How. [U. S.] R., 127.)

INGALLS, J.:

This is an appeal from the decision of the surrogate in regard to the last will and testament of Edward Isidore Sears.

The controversy arises upon the seventh clause thereof, which is as follows :

"Seventh. I give and devise all my real estate, consisting of two brown stone houses and lots on which they are erected, namely : The house and lot No. 244, East Forty-ninth street, between Second and Third avenues, and the house and lot No. 106, East Sixty-first street, between Lexington and Fourth avenues, in the city of New York, *to the trustees of Manhattan College*, in the city of New York, and their successors forever, *in trust*, to receive the rents, issues and profits thereof, and to apply the same *to the use* of said *Manhattan College*, for the following *purpose*, to wit, to found and maintain a Latin professorship. The foregoing devise is made to the said trustees on the *express condition* that, *out of the rents, issues and profits* of the said real estate, the *said trustees and their successors* shall pay to my wife Catharine Irvine Sears, an annuity of \$1,500 per annum, for and during the term of her natural life, the same to be paid to her in monthly or quarterly payments, as the said Catharine Irvine Sears may elect."

"After the death of my wife, but not before, I authorize and empower the said trustees and their successors, in their discretion, to sell any or all the *real estate hereby devised in trust*, namely, the two houses and lots above mentioned, and invest the proceeds thereof, and from time to time to change the said investments as they may be advised, and to receive the rents, profits, issues, interest and income thereof arising from such investments, and to apply the same in the same manner and *upon the same trusts* as those on which said real estate is devised."

This devise is in legal effect to Manhattan College, which is a corporation, and as such competent to take and hold the property in question. The purpose to which the same is devoted is clearly defined by the will and is legitimate. This provision may be construed to be a devise of the property to the corporation, subject to the payment of the annuity to the widow of the testator during her natural life. We perceive no valid objection to a devise of property to a corporation, for a purpose clearly defined, and proper in itself, even though charged with the payment of an annuity out of the rents and profits. What objection could there be to a corporation accepting a devise of real estate, subject to the payment of rent

upon a lease thereon? How does the devise in question differ in legal effect? We do not discover wherein the devise in question contravenes any statute or settled legal principle.

The opinion of the surrogate contains an ample collection of the decisions bearing upon the questions involved in this controversy, and he has ably discussed them in their bearing upon such questions.

The conclusion at which he has arrived is entirely satisfactory, and we adopt such opinion without further discussing the case.

The following is the opinion of Hon. Delano C. Calvin, surrogate :

After the evidence of the subscribing witnesses was taken in this matter — which evidence shows satisfactorily that the will in question was, in all respects, duly executed, conformably to the statute, the counsel for the contestant stated that he made no objection to the admission of the will to probate as a will of personal property, but objected to its admission as a will of real estate, upon the ground that the seventh clause of the will, which assumes to dispose of the testator's real estate, is void, on the grounds :

First. That it is a devise to the trustees of Manhattan College and their successors.

Second. That if the devise shall be held to be to the college, it is void because the college has no capacity to take and hold the property in trust.

The seventh clause of the will reads as follows :

"Seventh. I give and devise all my real estate, consisting of two brown-stone houses and the lots on which they are erected, viz.: The house and lot number two hundred and forty-four (244) East Forty-ninth street, between Second and Third avenues, and the house and lot number one hundred and six (106) East Sixty-first street, between Lexington and Fourth avenues, in the city of New York, to the trustees of Manhattan College in the city of New York and their successors forever — in trust to receive the rents, issues and profits thereof, to apply the same to the use of said Manhattan College for the following purposes, to wit, to found and maintain a Latin professorship in said college, to be called the "Sears Professorship." The foregoing devise is made to said trustees on the *express condition*, that out of the rents, issues and profits of said real estate the said trustees and their successors shall pay to my wife Catharine Irvine Sears an annuity of fifteen hundred



dollars per annum, for and during the term of her natural life; the same to be paid to her in monthly or quarterly payments, as the said Catharine Irvine Sears may elect.

"After the death of my said wife, but not before, I authorize and empower the said trustees and their successors, in their discretion, to sell any or all the *real estate hereby devised in trust*, viz., the two houses and lots above mentioned, and invest the proceeds thereof, and from time to time to change the said investments as they may be advised, and to receive the rents, issues, profits, interest and income thereof arising from such investment, and to apply the same in the same manner and upon the same trusts as those on which said real estate is devised."

The first question to be considered in this matter is whether this court has the power to determine this question.

Prior to the statute of 1870, chapter 359 (applicable to the surrogate of this county only), the surrogate had no authority to construe wills, except so far as it became necessary on the final accounting, and the proponent's counsel objects to the jurisdiction of the surrogate to pass upon the questions sought to be raised by the counsel for the contestants.

This inquiry must be answered by the language of the act, and the reasonable inferences to be drawn therefrom, as this court is one of peculiar and special jurisdiction, and can only exercise the jurisdiction and powers which, by a favorable construction of the statute, are found to have been conferred upon it. (*Cleveland v. Whiton*, 31 Barb., 544; *Sibley v. Waffle*, 16 N. Y., 180; *Seaman v. Duryea*, 11 id., 324; *Wilcox v. Smith*, 26 Barb., 316.) And many other authorities to the same effect might be cited.

Redfield, in his *Treatise on Surrogates*, says, at page 22 :

"The principle is now fully established by authority and practice that, although where the statute directs the surrogate to proceed in any certain way he must proceed in that way and no other, yet, if justice demands that, in regard to some subject that is within his jurisdiction, he should exercise an incidental power which has not been expressly given to him by the statute he should not for that reason decline to exercise it."

The learned chief justice of the Court of Common Pleas, in *The Matter of Brick's Estate* (15 Abb. Pr. R., 12), holds that in

all matters submitted to their cognizance surrogates are authorized to proceed according to the course of the court having, by the common-law, jurisdiction of such matters, except so far as they are restricted by statutes, and they have such incidental powers as are necessary to carry those which are necessary into effect; and the eleventh section of the act of 1870, above referred to, provides that in any proceeding before the surrogate of the county of New York, to prove the last will and testament of any deceased person as a will of real or personal estate, or both, in case the validity of any disposition contained in such will is contested, or their construction or legal effect called in question by any of the heirs or next of kin of the deceased or any legatee or devisee named in the will, the surrogate shall have the same power and jurisdiction as is now vested in and exercised by the Supreme Court, to pass upon and determine the true construction, validity and legal effect thereof; and the same section provides for the entry of his decision in his minutes and for the review by appeal by any of the heirs, next of kin, legatees or devisees, in the same manner and with the same effect as appeals may be taken from his decision admitting or refusing probate.

The effect of this statute has been the subject of considerable discussion on the part of the profession, but it seems never to have been judicially determined.

The principal objections which have been urged against the general authority of the surrogate of this county, to entertain proceedings for the construction of wills, are :

First. That that jurisdiction has hitherto been exclusively vested in the courts exercising equitable authority; and,

Second. That there is no provision in the act in question, or otherwise, for the citing of legatees or devisees for the purpose of such construction.

When these questions were first raised I was inclined to the opinion that, in consequence of these defects or omissions of the statute, it would be unwise for the court to entertain jurisdiction for the purpose of a construction of a will, except so far as such determination became necessary in passing upon the probate of the will; but upon a more careful examination of the terms of the section, it is quite clear to my mind that the legislature intended by it to confer

on the surrogate of this county full power, authority and jurisdiction, upon probate, to pass upon the validity of any of the dispositions of said will which should be contested, and upon their construction or legal effect when called in question by any of the heirs, next of kin, legatees or devisees, as amply and conclusively as the Supreme Court may do; and I am of the opinion that it is my duty to accept that jurisdiction and responsibility whenever presented; and that when the act in question confers that jurisdiction and defines its effect upon the parties interested, I entertain no doubt of my authority, as an incident to the performance of that duty, to bring in all the parties interested for that purpose; but I am equally clear in the opinion, that when a case has been submitted to me without such parties being called in, I should refuse to exercise the jurisdiction, except so far as it may become necessary for the purpose of passing upon the probate of the instrument in question, as a will of real and personal property, until such parties shall be brought in.

It is conceded by the counsel for both parties, that Manhattan College in question is incorporated by the Regents of the University, under the authority conferred upon them by chapter 184 of the Laws of 1853; and reference to that chapter shows that such organization is under the authority of trustees who have the management of the college; and the act provides for such college holding and possessing real and personal property to an amount specified.

The next question to be determined is, whether the will in question devised the real estate, by the seventh subdivision thereof, to the trustees as *individuals* rather than to them as constituting the corporation of Manhattan College; and it is claimed by the learned counsel for the contestant that the devise in question was to the trustees as contradistinguished from the college, the college being a beneficiary, together with the widow; to which he cites the case of *The New York Sailors' Snug Harbor* (3 Pet., 99), where it is said, that a testator in appointing trustees, may designate them by official titles instead of by name; in which case they take as if they had been designated by proper names. But in that case the devise was to the chancellor of the State of New York, mayor and recorder of the city of New York, president of the Chamber of Commerce in the city of New York, president and vice-president of the Marine

Society of the city of New York, senior minister of the Episcopal church in said city, and senior minister of the Presbyterian church in said city, in trust, to erect and build an asylum or marine hospital to be called "The Sailor's Snug Harbor, for the purpose of maintaining and supporting the aged and decrepit; and wherein our sailors," etc. There is a very wide distinction between that and the devise in question, for in that case there was no such corporation as "Sailors' Snug Harbor," and the trustees named occupied no relation to any such corporation or enterprise; while, in this case, the trustees named are executive and corporate officers of the college.

In *The New York Institution for the Blind v. How's Executors* (10 N. Y., 84) it was held that a bequest "to trustees" of an institution was a bequest to the institution, although those having charge of it were in the charter called managers. They are still defined and treated as trustees and known in law as such. (See 1 R. S. at Large, 600 [marg. p.], §§ 9, 10; 2 id., 462, § 33.)

In *The Consistory of the Reformed Dutch Church v. Brandow* (52 Barb., 228) the devise was to the consistory of the Reformed Dutch Church of Prattsville, that is, to the ministers, elders and deacons and their successors in office, to be held, used or invested for the benefit and use of the said church, in such manner as they may deem best for the interest of the church, etc. It was held that the testator clearly intended that the Reformed Dutch church mentioned should have the benefit of the bequest made by him to the consistory, provided the consistory could control the bequest; and at page 233 Mr. Justice MILLER says: "The bequest to the consistory was, in effect, a bequest to the church corporation itself, and was not the less so because it was devised to those officers."

In *Bayley v. Onondaga County Mutual Insurance Co.* (6 Hill, 476) a bond executed by an agent for the faithful performance of his duty, was to the directors of the company, to be paid to them, their successors and assigns, and was held to be in legal effect made to the company; and that the company might maintain an action upon it in their corporate name, and that the board of directors, being the only legal agents of the corporation, were to be regarded as its representatives in all their official acts and doings. To the same effect see *The African Society v. Varick* (13 Johns., 38).

In *The Attorney General v. Tancred* (Ambler, 351) a convey-

ance was made to the use of the masters of Christ and Caius College, the Presbyterian College, the College of Physicians, the treasurer of Lincoln's Inn, the master of the Charter House, the governor of Chelsea and Greenwich Hospital for Seamen, in trust, it was held that the conveyance was for the benefit of the bodies corporate of the said colleges, and not for the fellows in their natural capacity. (See case of *Christ's College, Cambridge*, 1 Wm. Blackstone, 90.)

In *Manice v. Manice* (43 N. Y., 387) the testator, among others, directed his trustees to pay \$5,000 unto the treasurer, for the time being, of Yale College, in New Haven, and requested the trustees of the college to invest in New York securities or on bond and mortgage and accumulate the interest, etc., it was held, at page 387, that the direction to pay the treasurer was a good gift to the college, the college having been shown to be capable of taking it.

From these authorities, and such consideration as I have been able to give the terms of the will, I am of the opinion that the testator used the term trustees of the Manhattan College and the Manhattan College as synonymous, and both as designating the corporation.

And I am unable to perceive any good reason for his selecting the trustees, instead of the college to be his trustees for the benefit of the college, as *cestuis que trust*, particularly as there is no evidence to show that he had any particular acquaintance with or confidence in them; and it seems to me that if he had intended to vest the title of the estate devised in the trustees, instead of the college or corporation, he would have made some of his confidential friends appointed as executors and trustees for the purpose. And I am therefore of the opinion that the estate devised by the seventh clause of the will was intended to and did vest in the Manhattan College as a corporation.

This conclusion renders it unnecessary that I should consider the question so exhaustively and ably presented by the learned counsel, for the contestants that the devise is void as a contravention of the 2 Revised Statutes (Bank's 6th ed., p. 1101, § 15) upon the subject of the unlawful suspension of the absolute power of alienation, though I have examined the authorities upon the subject in detail with special interest, nor is it necessary that I should enter into the much-debated and vexed question whether charitable uses are abolished

by our statutes, which seems to have been set at rest by the case of *Holmes v. Mead* (52 N. Y., 332), as it is conceded by the respective counsel that our statutes upon uses and trusts (2 R. S. [Bank's 6th ed.], §§ 55, 56, p. 1106, and § 60, p. 1107) authorize such a devise to the college in question, for the purpose named in the will.

The next question to be considered is whether the trust in behalf of the widow renders the devise void, because of the incapacity of the college to take the same incumbered by that trust.

The counsel for the contestant claims that the devise is void, because the college has no power, under chapter 318 of the Laws of 1840, to receive real estate in trust for another, as enlarged by chapter 261 of the Laws of 1841, and cites section 3 of 2 Revised Statutes at Large, marginal paging 57; but that section, as it seems to me, does not sustain this construction. Its provision is that no devise to a corporation shall be valid unless such corporation be expressly authorized by its charter or by statute to take by devise. That section does not attempt to limit the purpose for which a devise may be received.

In *Tiffany & Ballard*, in their "Treatise on the Law of Trusts and Trustees," the case *In the Matter of Howe* (1 Paige Ch., 214) is cited with approbation, and in "Perry on Trusts," (§ 44,) it is said: "A corporation may take and hold in trust for another, or for a stranger or for an individual, as where one gave a legacy to a church corporation in trust, to pay the income to his housekeeper for life and after her death to apply it to church purposes, it was held that the corporation might well execute the trust, on the principle that when property is given to a corporation partly for its own use and partly for the use of another, the power of the corporation to take and hold for its own use carries with it as a necessary incident the power to execute that part of the trust which relates to others."

In *The Matter of Howe* (1 Paige, 214), above cited, a legacy was given to St. George's church in trust, to pay the income to the testator's housekeeper for life. After her death the income thereof to be applied to the purchase of a church library and support of the Sabbath school in the church, and other church purposes to which church contributions might be applied according to the tenets of the Episcopal church, and the chancellor, at page 214, says:

"It is a general rule that corporations cannot exercise any powers

not given to them by their charters or acts of incorporation ; and for that reason they cannot act as trustees in relation to any matters in which the corporation has no interest. But whenever property is devised or granted to a corporation partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use, carries with it, as a necessary incident, the power to execute that part of the trust which relates to others. In this case the substantial part of the legacy is for the benefit of the corporation ; and the income thereof, after the death of the housekeeper, is to be applied to some of the purposes to which the rector, church wardens and vestrymen are authorized to apply the general funds or temporalities of the church committed to their management. The testator had a right to limit his bounty to a part of the objects to which they might appropriate the general funds of the corporation. He also had a right to direct when the income should be applied for that purpose. If the corporation receive the legacy, it must be received charged with the payment of the interest or income to the housekeeper for life. The legacy must, therefore, be paid over to the rector, church wardens and vestrymen as the representatives of the corporators, who are bound to carry into effect the testator's will in respect to the same."

In the case under consideration it is equally true that the substantial part of the legacy is for the benefit of the corporation, and it seems to me that it would be a very illogical as well as inequitable construction, that because a subordinate trust was created in favor of the widow that the intention of the testator to give the college the principal benefit of the devise should be defeated. In *The Trustees of Phillips Academy v. King's Executor*, it was held that a corporation is capable of taking and holding property as trustee. (12 Mass. R., 564.)

In *Vidal v. Girard* (2 How. [U. S.], 127), the corporation of the city of Philadelphia had power by its charter to take real and personal estate by deed and devise, and it was held that, having this power, it might also take and hold property in trust in the same manner and to the same extent that a private person might do. Mr. Justice STORR, in delivering the opinion, at page 187, says : " Now, although it was in early times held that a corporation could not take and hold real or personal estate in trust, upon the

ground that there was a defect of one of the requisites to create a good trustee, viz., the want of confidence in the person; yet that doctrine has been long since exploded as unsound and too artificial; and it is now held that where the corporation has a legal capacity to take real or personal estate, there it may take and hold it upon trust, in the same manner and to the same extent as a private person might do. "It is true that if the trust be repugnant to, or inconsistent with the proper purposes for which the corporation was created, that may furnish a ground why it may not be compellable to execute it, but that will furnish no ground to declare the trust itself void, if otherwise unexceptionable, but it will simply require a new trustee to be substituted by the proper court possessing equity jurisdiction, to enforce and perfect the objects of the trust." In *Tinkham v. Erie Railway Company* (53 Barb., 393), where the question was determined as to the right of the defendants, a corporation, to take real estate subject to the condition that a portion of the land should be kept open as public streets, it was adjudged that such condition was valid and that the corporation could hold the real estate; and Mr. Justice BALOOM, in delivering the opinion of the court, at page 395, recognizes the full authority of the case of *Howe's Executors*, above cited, as applicable to real estate as well as personal, wherein he says:

"The true rule applicable to the question was stated by Chancellor WALWORTH, in the matter of *Howe's Executors, etc.* (1 Paige's Chancery, 214), which is, wherever property is devised or granted to a corporation partly for its own use and partly for the use of others, the power of the corporation to take and hold the property for its own use, carries with it as a necessary incident the power to execute that part of the trust which relates to others."

It is urged by counsel for the contestants that the authorities above cited are not applicable to a case where there is a devise in trust, while he recognizes the soundness of the rule as laid down in respect to personal property; but I am unable to appreciate any substantial distinction between a bequest and a devise in respect to the question of the authority of the corporation to take and execute the trust.

The fifty-sixth section of 2 Revised Statutes, at page 1106, above cited, authorizes incorporated colleges, together with the



sixtieth section, on page 1107, to receive and hold in trust real and personal property, to found and maintain professorships and scholarships, among other things, which seems to put real and personal property upon the same footing; and, I think, the devise in this case is in strict conformity to that authority, and the fact that the devise is incumbered by a subordinate trust, ought not to deprive the college of the benefit of the devise or defeat the obvious intention of the testator.

If the principle be admitted, which seems to be inevitable from these authorities, that a corporation may receive property in trust and that its functions are dependent upon its charter and the statutes relating to it, it must be admitted that there is no statute expressly authorizing a corporation to receive and execute a trust outside of the legitimate purposes of its organization, nor is there any thing in the statute of uses and trusts which forbids the taking, by a corporation, of real estate by devise in trust for a third party, except such as are implied by the statutes of 1840, above cited, and it seems to me that if the case of *Hove's Executors*, above cited, is good law in respect to the taking and holding personally in trust, partly for the benefit of the corporation and partly for the benefit of a third person, the principle is equally applicable and reasonable when a devise of real estate is received subject to a subordinate trust to the widow, as in this case, and it is impossible to conceive that the learned chancellor in that case, and Mr. Justice BALOOM, in *Tinkham v. The Erie Railway Company*, and Mr. Justice STORY, in *Vidal v. Girard's Executors*, above cited, and the learned authors in Perry on Trusts and Tiffany & Ballard on the same subject, should have used language applicable alike to a devise of real estate and a bequest of personal property, when they intended only to embrace a bequest.

Upon the best consideration that I have been able to give the subject, I am unable to appreciate any such distinction as is sought to be made in this case, or to perceive any good reason for denying the college in question the benefit of the devise, because coupled with a subordinate trust to the widow as a condition subsequent. I am, therefore, of the opinion that the devise to the trustees of Manhattan College in trust for its legitimate purposes, though subject to the trust in behalf of the widow, is valid and vested the

title in the corporation, and that it has full power and ample authority to execute the trust in behalf of the widow as well as for its own benefit.

The next and final question to be considered in this matter is the effect of chapter 360 of the Laws of 1860, which provides that no person having a husband, wife, child or parent, shall, by his or her last will and testament, devise or bequeath to any benevolent, charitable, literary, scientific, religious or missionary society, association or corporation, in trust or otherwise, more than one-half part of his or her estate after the payment of his or her debts; and such devise or bequest shall be valid to the extent of one-half and no more; and chapter 319 of the Laws of 1848, which provides that no person leaving a wife, child or parent, shall devise or bequeath to a benevolent, charitable, scientific or missionary society or corporation more than one-fourth of his estate after payment of his or her debts, and such devise and bequest shall be valid to the extent of one-fourth, and no such devise or bequest shall be valid in any will which shall not have been made and executed at least two months before the death of the testator; and the earlier portion of the same section limits such a devise or bequest the clear annual income of which shall not exceed \$10,000; but the counsel for the contestants, in his argument, does not raise any question under this latter section — whether because as to the prohibition respecting the annual income of the devise he regards the remedy as resting exclusively in the attorney-general against the corporation as to the question of the excess over one-fourth, and the time of executing the testament is repealed by chapter 360 of the Laws of 1860, above cited, does not appear.

I think there is no reason to doubt that the act of 1848, which seems to be confined to benevolent, charitable, literary, scientific, missionary, mission or other Sunday-school purposes, or mutual improvement in religious knowledge, or the furtherance of religious opinions, does not apply to an institution like Manhattan College; but if it did, the act of 1860 would seem to be a repeal of the prohibition contained in the sixth section of the act of 1848. In *Bascom v. Albertson* (34 N. Y., 616) Mr. Justice PORTER, in referring to the act of 1860, says:

“The purpose of the law is not only expressed in its title, but

apparent upon its face. It was designed to regulate and restrict the power of testators. It was neither conceived nor framed in a spirit of hostility to charitable societies; on the contrary, it enlarged the proportion of a testator's estate which he might dedicate to charitable uses in exclusion of the claims of his own immediate family." And in *Chamberlain v. Chamberlain* (43 N. Y., 440), Mr. Justice ALLEN treats the act as applicable to an educational institution incorporated by the Regents of the University and as a subsisting prohibitory act upon the subject.

The act of 1860 was doubtless made for the purpose of protecting the rights of husband, wife, child or parent. If the academy is covered by the act of 1860, there seems to be no doubt that it covers the college in question, and the term "literary and scientific association or corporation," would seem fully to define the character of the Manhattan College, and I have no doubt of its application to the college in question.

The point is not raised in this case, that there is no one but the widow interested in this question, and that she desires the enforcement of the devise according to the terms of the will; but in *Harris v. American Bible Society* (4 Abb. [N. S.], 421), Mr. Justice FULLERTON, in discussing this question, at page 427, says:

"The General Term held, and I think, properly, that the prohibition is peremptory, and may be insisted on by any person who would derive a benefit therefrom; the language is absolute, and if the courts have power in any such case to judge concerning the probable motives of the legislature, and may imply, accordingly, an exception to the positive terms of a statute (on which no opinion need now be expressed), I am unable to discover any safe ground for such a proceeding in this instance."

And in that case it is held that the prohibition is peremptory and that the half is to be computed with reference to the estate at the time of the testator's death. And in *Chamberlain v. Chamberlain* (above cited) it is decided that in ascertaining the estate, only one-half of which can be devised to charitable or educational corporations, under the act of 1860, the widow's dower and the debts are to be first deducted, and the latter case seems to leave no doubt as to the right of the contestants in this matter to raise the question growing out of the prohibition of the act of 1860. But as the Manhattan College, the

legatees under the disputed devise, is not a party to these proceedings, I am of the opinion that I ought not to assume to make a reference as to the amount of the estate, under the statutes of 1860, or take any further proceeding in respect to it until said college shall be brought in, and when brought in, if the counsel for the contestants shall so elect, a reference may be made to take testimony and report upon the question of the amount of the devise to said college over and above the widow's dower and the debts of the estate, and until the coming in of the referee's report and the determination of the question under section 11 of chapter 359 of the Laws of 1870, the probate should be suspended.

This case will present a fit opportunity for the ultimate determination of the question as to the jurisdiction of this court over the validity of dispositions by will, on a contest, and their construction or legal effect when questioned by any of the heirs or next of kin of the deceased, or legatee or devisee under the eleventh section aforesaid.

DAVIS, P. J., and BRADY, J., concurred.

Decree affirmed, with costs.

13	474
60	530
13	474
68	618

18h	474
57ad	472

ADOLPH HEILBRUN, RESPONDENT, v. EDWARD A. HAMMOND, IMPEADED WITH AMANDA A. RACEY AND OTHERS, APPELLANT.

*Recording acts — assignment — latent defect in acknowledgment — effect of — Discharge of mortgage by mortgages, after assignment of.*

In March, 1873, one R. was the owner of premises subject to a mortgage for \$8,000 held by one Aymar. R. desiring to raise more money, a mortgage for \$7,000 was executed to one Pardee, dated March 25, 1873, and recorded April 4, 1873, but Pardee having refused to make the loan the plaintiff agreed to advance the money and took an assignment of the mortgage from Pardee, dated April 16, 1873, and recorded April 17, 1873. The acknowledgment to this assignment, though regular upon its face was, in fact, taken by a notary public of New York county out of his county, to wit, in the State of New Jersey. Subsequently Aymar desiring to have his money a search was made by the Seaman's Savings Bank, which had agreed to furnish the money, and the Pardee mort-

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gage discovered; thereafter by an arrangement between Pardee and R. the former executed a satisfaction-piece of the mortgage and an entry was made by the Register to the effect that the same was discharged of record; the assignment to the plaintiff being then on record. Subsequently another mortgage was given upon the premises and the same was thereafter assigned to defendant H. In an action to foreclose plaintiff's mortgage it was claimed that the acknowledgment to the assignment from Pardee to plaintiff was void and its record was not notice to subsequent mortgagees.

*Held*, that the plaintiff having acquired title to the mortgage which was recorded, and the assignment and certificate of acknowledgment being in due form and recorded, notice was thereby given to all subsequent purchasers or mortgagees that he was the owner thereof, and his rights were not affected by the discharge of the mortgage by the Register;

That the recording of the assignment to plaintiff, as a notice to subsequent mortgagees, was not invalidated by proof that the acknowledgment was taken in New Jersey by a notary public of New York county, when his certificate was in due form and purported to have been taken in New York.

APPEAL by the defendant Hammond from a judgment in the above action, entered after a trial by the court without a jury.

The action was brought to foreclose a mortgage.

*James O. Hoyt*, for the appellant. The recording of a mortgage is notice to all the world that such an incumbrance exists. The discharge of the record must be an official destruction of such notice. (*Frost v. Beekman*, 1 Johns. Ch., 288; *Peck v. Mallams*, 10 N. Y., 519, 520.) The respondent had a right to rely upon the records. (*Van Keuren v. Corkins*, 66 N. Y., 77.) Even if the record of an assignment of a mortgage be notice to one dealing subsequently with the equity of redemption the record of respondent's assignment was not notice to the appellant since it was not entitled to record. This rests upon the principle that a conveyance not entitled to be recorded, though written upon the record, is no notice of such conveyance. (*Herman v. Cameron*, 24 Wend., 89; *Johnson v. Humphrey*, 1 Johns. R., 498; *Jackson v. Shoemaker*, 4 id., 161; *Jackson v. Perkins*, 2 Wend., 137.) The whole current of authorities of text writers and of adjudged cases upon this point runs in one direction, holding that the record of instruments not entitled to record is of no force or value and notice to no one. (2 Sugden on Vendors [14th ed.], 540; 4 Kent Com. [12th ed.], 174; *Frost v. Beekman*, 1 Johns. Ch., 300; *Peck v. Mallams*, 10

N. Y., 518-520; *Carter v. Champion*, 8 Conn., 550; *Johnson v. Slater*, 11 Gratt., 321; Virginia Code, p. 897, § 5, and p. 904, § 2; *De Witt v. Moulton*, 17 Maine, 418; *Brown v. Lunt*, 37 id., 427; *Newman v. Smales*, 17 Iowa, 528; *John v. Richardson*, 3 Md. Ch. Dec., 57; *St. John v. Conger*, 40 Ill., 535; *Jackson ex dem. Wyckoff v. Humphrey*, 1 Johns. R., 498.)

*Estes & Barnard*, for the respondent. The assignment and certificate of acknowledgment being in due form, and the acknowledgment appearing on its face to have been duly taken in the city and county of New York before a proper officer, the presumption of law is that it was actually taken within said city and county and it was receivable as evidence of its own genuineness, and the plaintiff had a right to rely on the legal presumption that the acknowledgment was taken within the city and county of New York. (*The People v. Snyder*, 41 N. Y., 397, 402; *Thurman v. Cameron*, 24 Wend., 87; *Morris v. Wadsworth*, 17 id., 113.) The assignment being on record before the execution of the satisfaction-piece by Pardee the plaintiff's lien and rights could not be, and were not, affected by such satisfaction-piece. (*Belden v. Meeker*, 47 N. Y., 307, 312; *Vanderkemp v. Shelton*, 11 Paige, 28; *Ely v. Scofield*, 35 Barb., 330; *St. Johns v. Spaulding*, 1 N. Y. Sup. Ct. [T. & C.], 483.) Pardee having no right to execute a satisfaction of the mortgage the plaintiff had a right to treat the mortgage as a valid and subsisting security, notwithstanding the fraudulent satisfaction which had been entered of record; and this right is enforceable not only against the mortgagors but against the defendant Hammond, even if he advanced his funds on the faith of the supposed satisfaction. (*The Farmer's Loan and T. Co. v. Walworth*, 1 N. Y., 433, 443; *Gillig v. Maas*, 28 id., 210; *Swarthout v. Curtis*, 5 id., 301.) Where the discharge of a mortgage has been obtained by fraud equity may treat the discharge as a nullity. (*Washburn on Real Prop.*, 562; *Barnes v. Cormack*, 1 Barb., 392.) And the cancellation of the mortgage may be declared void where it is made in violation of the rights of third persons. (1 *Hilliard on Mortgages*, 335; *Bruce v. Bonney*, 12 Gray, 113; *Briggs v. Davis*, 20 N. Y., 15; *Swarthout v. Curtis*, 5 id., 301.) It was unnecessary for plaintiff to record his assignment except to protect himself against a

subsequent assignee of the same mortgage from Pardee. It is not necessary for a person to record an assignment of a mortgage in order to protect himself against a subsequent conveyance or mortgage from the owner of the premises. (*Greene v. Warnick*, 64 N. Y., 220, 226, 227; *Raynor v. Wilson*, 6 Hill, 469; *Gillig v. Maas*, 28 N. Y., 208, 211; *N. Y. L. Ins. Co. v. Smith*, 2 Barb. Ch., 82; *Power v. Lester*, 23 N. Y., 531.) A subsequent purchaser in good faith in the recording act means, as to this case, a subsequent purchaser of the mortgage assigned, not a purchaser or mortgagee of the premises. And an omission to record an assignment does not affect its priority, and subsequent purchaser or mortgagees of the premises are bound by a prior recorded mortgage, no matter who holds it. (*Campbell v. Veder*, 1 Abb. Ct. App. Dec., 295; *Purdy v. Huntington*, 42 N. Y., 334.)

INGALLS, J. :

This appeal presents a question of considerable practical importance, and not free from difficulty. So much has been decided in regard to the recording acts and so much discussion indulged not strictly essential to the disposition of the particular case, that it is difficult to discover what is really settled by the decisions. The facts of this case which bear upon the question involved in this controversy are substantially as follows: Amanda A. Racey, in March, 1873, was the owner of premises described as No. 20 West Thirteenth street, in the city of New York, which were subject to a mortgage for \$8,000, held by one Augustus Aymar. For the purpose of raising an additional sum of money, Mrs. Racey joined with her husband, Joseph H. Racey, in executing a second mortgage upon the same premises for \$7,000, to Denis S. Pardee, dated March 25, 1873, which was recorded in the register's office of said city, April 4, 1873. A bond accompanied the mortgage. Pardee, for some reason, declined the loan, and the plaintiff advanced the money and took an assignment of the bond and mortgage from Pardee, which was executed by him April 16, 1873, and recorded in said register's office April 17, 1873. Augustus Aymar required the payment of the money upon his bond and mortgage, and the Raceys applied to the Seaman's Bank of Savings to loan the money to pay Aymar. Upon searching the record the plaintiff's mortgage was discovered,

and by an arrangement between Pardee and the Raceys the former was induced to, and did, execute a discharge of plaintiff's mortgage, which was recorded in the register's office and an entry made by the register to the effect that such mortgage was discharged upon the record. The Seaman's Bank of Savings thereupon made the loan, accepted and recorded the mortgage, and the money thus loaned was applied to the payment of the Aymar mortgage, which was discharged of record. Subsequently, the Raceys executed another mortgage, upon the same premises, to secure a loan of \$5,000 to Edward B. Terrell, which was recorded June 15, 1874, which was assigned by said Terrell to Edward A. Hammond, one of the defendants in this action. The plaintiff advanced his money in good faith, relying upon the bond and mortgage and the assignment thereof by Pardee. The mortgage and assignment were both recorded in due form, so upon the face of the record the plaintiff appeared to be the owner of the mortgage. The Revised Statutes (vol. 1, p. 707, § 1 [Edm. ed.]) provides, that "Every conveyance of real estate, within this State, hereafter made, shall be recorded in the office of the clerk of the county where such real estate shall be situated, and every such conveyance not so recorded shall be void as against subsequent purchasers, in good faith and for a valuable consideration, of the same real estate or any portion thereof, whose conveyance shall be first duly recorded." This and the subsequent sections of the same chapter apply to mortgages and assignments thereof.

The assignment from Pardee to the plaintiff is assailed upon the ground, that it was acknowledged by Pardee in the State of New Jersey, and therefore the certificate of the notary public of New York, although regular upon its face, was void, and the registry of the assignment was also void. George W. Vulter, the notary public who took the acknowledgment of Pardee to the assignment, testified that he first took it in New Jersey, and, upon his attention being called to its irregularity he took another acknowledgment in New York. The court, for some reason, gave no effect to the testimony in regard to the second acknowledgment, and disposed of the case regardless of it.

It is therefore proper for this court in reviewing the decision, to follow the same course in respect to such evidence. Vulter was, at the time he took the acknowledgment of the assignment from



Pardee to plaintiff, a notary public of the city and county of New York; and the records of the register's office showed that fact. The certificate of acknowledgment was in due form, and so far as the assignment and its execution indicated, upon the face of the paper, it was entitled to be recorded. The record was perfect; showing the plaintiff to be the owner of the mortgage; and this was consistent with the fact, as the plaintiff had advanced his money upon the faith of the security. The assignment, so far as it operated to transfer the title of the bond and mortgage, was effectual without an acknowledgment. Indeed, the transfer could be supported without even a written assignment. Therefore the question involved is only one of *notice* to a subsequent mortgagee, or rather, to an assignee of a subsequent mortgage. The record, fully examined, disclosed the assignment to plaintiff in due form, properly recorded, and notified the inquirer that the plaintiff had become the owner of the bond and mortgage prior to the discharge thereof by the register, and that the plaintiff was the proper person to be applied to for information in reference thereto. So it will be perceived, *that as notice* in regard to the ownership of such mortgage, it was as perfect in all respects as if the acknowledgment had been taken in New York, as the certificate indicated. It is insisted by the appellant that the plaintiff's mortgage was discharged by Pardee, and the record showed that fact, and therefore Hammond was protected. The soundness of this proposition depends upon whether under all the facts proved, Pardee had any authority to execute such discharge, and thereby affect the rights of the plaintiff, and whether the evidence of such want of authority was not furnished by the records in the register's office, to a party who exercised the degree of care in making his investigations which the law requires. We are of the opinion that the record was ample notice; and when Mr. Hammond contented himself with merely ascertaining the fact that the plaintiff's mortgage had been discharged upon the record, without proceeding further in the search to ascertain whether the record disclosed an assignment of the mortgage, he acted at his peril; and the consequences of such want of prudence and care should be borne by himself and not transferred to the plaintiff, who seems to have omitted no duty on his part. It cannot be insisted that the plaintiff is chargeable with carelessness in regard to the

manner Vultur, the notary public, discharged his duty, because the plaintiff had a right to assume that he acted properly and in accordance with the certificate.

It would be unjust, and in my judgment unsound, to hold that a register upon the bare presentation to him of a discharge executed and acknowledged by a mortgagee, can discharge such mortgage of record, and thereby deprive an assignee thereof of his lien, when, at the time, his assignment is on record, executed and acknowledged in due form.

So far as the question of notice is involved — and it seems to me that is the vital question — we cannot think it competent to controvert the record by showing that the notary public exceeded his authority in taking the acknowledgment, so long as it did not appear by the record which he made and was not an act which was intended to, or did in fact at the time affect Mr. Hammond or the actual title of the plaintiff to the bond and mortgage. A contrary rule would be disastrous in its effect, so far as the reliability of the public records is concerned; all confidence in their disclosures would be destroyed.

There is a class of cases to which our attention has been directed, of which *Frost v. Beekman* (1 Johns. Ch., 288) is an example, where a mortgage was executed for \$3,000, but, by mistake, the clerk recorded it \$300. The court held, that under the circumstances of that case it could only be regarded a mortgage for the latter sum. That decision was placed upon the express ground that *as notice* to a subsequent purchaser, or mortgagee, it disclosed upon the record a mortgage for only \$300; that the mortgagee having trusted the clerk he must look to him for indemnity in case of loss. The mortgagee, in that case, had the original mortgage, by which he could have proved the accuracy of the record by comparing such original paper with the record, but he chose to depend upon the clerk; and as between himself and a *bona fide* purchaser or mortgagee who had not possession of the original paper, and therefore had no opportunity of making such comparison, but was compelled to rely upon the disclosure of the record, the latter should be protected. This case sustains the views which we have advanced upon the question of notice derived from an examination of the records.

The case of *Vankeuren v. Corkins* (66 N. Y., 77) does not affect

the question which we are considering in this case. In that case a mortgagor made payments upon his mortgage without notice or knowledge that it had been assigned, and the court held that the recording act did not apply to that case; which appears very clearly by referring to the Revised Statutes (vol. 1, p. 715, § 41 [Edm. ed.]), which provides, that "the recording of an assignment of a mortgage shall not be deemed, in itself, notice of such assignment to a mortgagor, his heirs or personal representatives, so as to invalidate any payment made by them, or either of them to the mortgagee."

The case of *Greene v. Warnick* (64 N. Y., 220) was decided upon a question entirely different from that involved in this case. The question there decided is simply, that when two mortgages are executed at the same time, neither to have priority, the fact that one was placed upon record fifteen minutes before the other, did not have the effect to give to an assignee of the mortgage first recorded a preference under the recording act, because the assignee, under such a state of facts, could not be regarded a subsequent purchaser within the meaning of the act.

It would be an endless task to discuss the numerous cases which have been decided bearing upon the recording act. We conclude:

First. That the discharge of the plaintiff's mortgage, by the clerk, did not affect his rights.

Second. That the plaintiff having acquired title to the mortgage, which was recorded, and the assignment and certificate of acknowledgment being in due form and recorded, notice was thereby given to all subsequent purchasers or mortgagees, that the plaintiff had become, and was, the owner of such mortgage, and his rights were not affected by the discharge of the mortgage by the register. (*Belden v. Meeker*, 47 N. Y., 308; *Ely v. Scofield*, 35 Barb., 330.)

Third. That the recording of the assignment to plaintiff, as a *notice to subsequent mortgagees*, was not invalidated by proof that the acknowledgment was taken in New Jersey by a notary public of New York, when his certificate was in due form, purporting to have been taken in New York, the plaintiff having taken such assignment in good faith and based upon a sound and adequate consideration.

The appellant further insists, that the plaintiff could not recover because the transaction was tainted with usury; and in no event

beyond the amount which he actually paid for the mortgage, as it had no inception previous to his purchase. The court decided correctly that the affidavit made by Alexander A. Racey, and which accompanied the bond and mortgage, and upon which the plaintiff relied, precluded the defense of usury and entitled the plaintiff to recover the whole amount secured by such bond and mortgage. (*Mason v. Anthony*, 3 Keyes, 609; *Lynch v. Kennedy*, 34 N. Y., 151; *Payne v. Burnham*, 62 id., 69.) Upon the question whether the recovery should only have been for the sum actually paid by the plaintiff, we think the entire amount was properly allowed.

The question does not seem to be presented in such form as to call for a review. The appellant asked the court to find as conclusions of law, as follows: "First. That the bond and mortgage are usurious and void. If not void, they are security only for the amount paid therefor at the inception thereof, at the time of said alleged assignment." The court refused to so find, and a general exception was taken to such refusal. The refusal was clearly sound in regard to the question of usury, and therefore the exception became unavailing to the appellant. When a request to find embraces two propositions, one of which the party is not entitled to, a general exception to such refusal to find the entire proposition is insufficient. (*Graham v. Chrystal*, 2 Keyes, 21.)

The circumstances of this case are not such, as in my judgment, call for the application of the rule invoked by the appellant. Mrs. Racey, the owner of the premises, did not appear in the action, nor does she ask this relief. Again, we perceive that the appellant Hammond was careful to provide himself with a similar shield, in the form of an affidavit, when he took the assignment of the Terrell mortgage, under which he claims; hence, this equitable principle is not claimed by the owner of the premises but by a party who purchased a security in the market.

We conclude that the decision of the Special Term was correct, and should be affirmed with costs.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed, with costs.

IN THE MATTER OF THE DEPARTMENT OF PUBLIC WORKS,  
ETC., RELATIVE TO THE OPENING OF ONE HUNDRED AND FIFTY-  
SIXTH, ONE HUNDRED AND FIFTY-SEVENTH, ONE HUNDRED AND  
FIFTY-EIGHTH AND ONE HUNDRED AND FIFTY-NINTH STREETS  
NEW YORK CITY.

*Commissioners of assessment — affidavit may be ordered heard, after report made*

The commissioners of estimate and assessment, acting under chapter 483 of 1862, had, after hearing the parties interested, prepared their report and a motion, to confirm the same had been duly noticed. At this stage of the proceedings, upon the application of certain of the parties interested, the court granted an order directing that certain affidavits should be submitted to, and considered by, the commissioners, or that the same should be used upon the motion to confirm the report of such commissioners as the corporation counsel should prefer. *Held*, that the order was proper and should be affirmed.

APPEAL from an order made at the Special Term.

In these proceedings the commissioners had, on the 17th day of July, 1876, published in the City Record a notice, as required by law, stating that they had (1) completed their report and filed it with the department of public works; (2) that all parties interested and who objected to the report should present their objections to the commissioners on or before the first day of September, 1876, and (3) that the commissioners would, for the ten week days following the first day of September, hear the parties so objecting, (4) designating the area of assessments, and (5) that the report would be presented to the court for confirmation on the fourth day of October, 1876.

By that report it appeared that the sum of \$6,238 had been awarded to, and \$52,328 assessed upon the adjoining property.

Pursuant to the above notice, objections were duly filed, before the expiration of thirty days, and hearings were had before the commissioners. A number of persons objected, that awards should not be made, on the ground that all the land in the street had been dedicated to public use. Other persons demanded that substantial awards should be made, on the ground that the streets had not been dedicated to public use.

The motion to confirm the report had been adjourned from time to time, from the fourth day of October, 1876, to the 25th day of July, 1877.

The commissioners had completed and signed their final report, and it was ready to be presented to the court for confirmation, on June 6, 1877. Changes had been made in the report, after hearing and considering objections as aforesaid, by the increase of certain awards and the decrease of certain assessments.

On July 17, 1877 (eight days before the day on which the motion to confirm the report was to have been made), an order to show cause made by the court was served on the counsel to the corporation, requiring the commissioners to show cause why Mr. Deering, attorney for certain parties interested, and who had before filed objections to the report, should not have leave to submit to the commissioners a certain affidavit made by him, dated June 9, 1877; and why the commissioners should not consider and examine the same before submitting their report to the court; or why the said parties should not have leave to read the same upon the coming in or presentation of the report of the said commissioners for confirmation.

An order to that effect was made, from which this appeal was taken.

*Hugh L. Cole*, for the corporation of New York.

*James A. Deering*, for Grinnell and others, owners assessed, respondents.

INGALLS, J. :

The report of the commissioners of estimate and assessment, although signed, had not been presented to the court for confirmation, when this motion was made. The court upon an order to show cause directed the affidavit in question, to be submitted to and considered by, the commissioners, or that the same should be used upon the motion to confirm the report of such commissioners, as the corporation counsel preferred. We perceive no substantial objection to such order. Over such proceedings the court possesses the power of supervision, with a view to prevent injustice or oppres-

sion. (*In the Matter of the Opening of Canal Street*, 8 Barb., 505.) In the case cited, this doctrine was carried further than is required to sustain this order. In proceedings of this nature, where so much machinery is involved, it not unfrequently happens that irregularities occur which require the intervention of the court, and when the necessity arises great liberality should be exercised in directing and controlling such proceedings, to the end, that neither the public or the private citizen is subjected to wrong or injustice.

When such an order is made it should not be interfered with unless clearly irregular. Our attention is called to the case *In the Matter of the Opening of Eleventh Avenue* (49 How., 208). That case is not in conflict with the views herein expressed.

The order should be affirmed with costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed with costs.

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JOHN FISHER, AS TRUSTEE, ETC., RESPONDENT, v. ROBERT  
MURDOCK, IMPEADED WITH OTHERS, APPELLANT.

*Corporation — discount of note given by an officer of — limitation of charter as to.*

This action was brought by the plaintiff, as trustee in bankruptcy of the Citizens' Savings Bank, upon two drafts drawn by a firm in New York upon a firm in Charleston, accepted by the latter firm and delivered to one Palmer who was a member of both firms. Upon his application the drafts were subsequently discounted by the bank, of which he was the vice-president, and of the stock of which he owned more than four shares. The drafts were drawn and accepted for the accommodation of Palmer.

The charter of the bank provided that no director or officer of said corporation should borrow or use any portion of the funds thereof, and that no loan of money should be made by it to any stockholder owning more than four shares of stock therein. It was insisted by the defendant that the drafts were void because taken by the bank in violation of the provisions of its charter. *Held*, that the prohibitions of the charter did not apply to a case in which a loan was made to a firm, corporation or association in which an officer or stockholder of the bank was a partner, stockholder or member, and that the plaintiff was entitled to recover.

APPEAL from a judgment in favor of the plaintiff entered upon a verdict directed by the court, and from an order denying a motion for a new trial made upon the minutes of the justice before whom the action was tried.

This action was brought by plaintiff, as trustee in bankruptcy of the Citizens' Savings Bank of South Carolina, against the defendants, who composed the firm of Courtney, Everett & Co., at New York, and the firm of W. C. Courtney & Co., at Charleston, to recover upon two bills of exchange drawn by said Courtney, Everett & Co. upon W. C. Courtney & Co., and accepted by the latter firm and delivered to the defendant Palmer, who obtained the same to be discounted by the Citizens' Savings Bank aforesaid, said Palmer being a member of both of said firms and also vice-president of said bank and a holder of more than four shares of the stock therein. It was claimed by the defendant that the Citizens' Savings Bank violated its charter in discounting the bills of exchange and could not, therefore, recover thereon.

*Gimball & Rives*, for the appellant.

*B. F. Watson*, for the respondent.

INGALLS, J.:

This action was brought by the plaintiff to recover of the defendants, who composed the firms of Courtney, Everett & Co., at New York and W. C. Courtney at Charleston, the amount of two bills of exchange drawn by said Courtney, Everett & Co., upon W. C. Courtney & Co., and accepted by the last-named firm, and delivered to John B. Palmer, who is one of the defendants. Palmer procured the same to be discounted by the Citizens' Savings bank. Palmer was a member of both said firms, and vice-president of said bank which was located in Charleston, South Carolina. The defendant Murdock alone answers, defends and appeals.

At the close of the evidence the defendant requested the court to direct a verdict in favor of the defendant on the grounds:

First. That the bills are illegal; that the bank under which the plaintiff claims, and in whose shoes he stands has violated its own



charter (§§ 5 and 6) by loaning money on paper on which one of its officers was directly liable, and by loaning money to a stockholder owning more than four shares of the stock of the bank, and by loaning money on paper, not secured by collateral security of any kind, and therefore, the very act by which the bank, and, through the bank, the plaintiff acquired title to the bills in question, was prohibited by statute, hence the bills founded on an illegal consideration are void and cannot be enforced.

Second. Also upon the second ground upon which the motion to dismiss was based ; such second ground was the following :

“ On the ground that it being in evidence that there was an agreement between John B. Palmer and the firms of Courtney, Everett & Co., the drawers, and W. C. Courtney & Co., the acceptors, that the said Palmer would individually take care of the bills at maturity. The bank having full knowledge of such agreement took the bills subject to the legal effect of such knowledge, that the agreement made Palmer the primary debtor for the money loaned on the bills, they being in the nature of security for Palmer. Hence, when the bank extended the loan, or renewed the bills at Palmer's request, without the knowledge or consent of Courtney, Everett & Co., or W. C. Courtney & Co., that, *ipso facto*, released those firms from liability.”

The foregoing are the only questions insisted upon by the defendants upon the trial, so far as I can perceive. In regard to the last-mentioned question, the evidence does not sustain the position assumed by the defendants. These facts are not shown to have been brought to the knowledge of the officers of the bank, and therefore, they did not become chargeable with notice or knowledge of any such agreement or understanding.

Palmer's knowledge not acquired while transacting, as an officer of such bank, any of its legitimate or ordinary business, would not be sufficient to charge the bank with knowledge. The mere fact that he was its vice-president, was not sufficient to charge the bank with knowledge of transactions in which Palmer participated. (Story on Agency, § 1406, p. 173 ; Angell & Ames on Corporations, § 308.) The evidence indicates that the bank became a purchaser of the bills of exchange for value, before their maturity, and without knowledge of any prior equities. The witness Sawyer, who was the assistant

cashier of the bank, states that the bills were discounted in the ordinary course of business; that he did not, nor did any other officer of the bank, to his knowledge, know or assent to any agreement between Palmer and the acceptors, that he, Palmer, should pay the drafts at maturity, and that the drawers and acceptors should not be liable thereon. Palmer's evidence is to the same effect, in regard to any knowledge by the bank of any such agreement.

The remaining question is, whether the plaintiff was prevented from recovering in this action in consequence of the violation of sections 5 and 6 of the charter of the bank.

Section 5 provides, "no director or officer of said corporation shall borrow or use any portion of the funds thereof."

Section 6 provides, "no loan of money shall be made by said corporation to any stockholder owning more than four shares therein."

This presents a grave question and one not without difficulty. Every statute should receive a reasonable interpretation, with reference to the evil intended to be remedied or prevented, or the purpose sought to be attained. The spirit and intention governs, rather than the letter, when they are in conflict. Obviously these provisions of the charter were intended to prevent the stockholders and officers of the bank from using the money of the institution for speculation or other private purpose, upon their individual responsibility. Certainly they were not intended to embarrass the bank by restricting its powers in regard to its ordinary and legitimate business. The other provisions of the charter negative any such intention. It would seem unnecessary to hold, in order to maintain this charter in its integrity, that where an officer or stockholder of the bank, was a partner in a firm, a stockholder in a corporation, or a member of an association that a loan to such partnership firm, corporation or association, by this bank, would be void, as a violation of such charter, in consequence of the interest of such stockholder or officer in such other firm, corporation or association. Now in regard to the bills of exchange in question, they were received by other parties, and discounted upon the faith of such security. In my judgment it was not a loan to Palmer in such a sense as to render it necessarily obnoxious to the provisions of such charter. So far as the evidence discloses, the bank acted in good faith, and discounted this paper in accordance with its ordinary custom and

method of transacting such business. We discover no substantial reason for interfering with the decision at the Circuit.

The judgment should be affirmed with costs.

DAVIS, P. J., and BRADY, J., concurred.

Judgment affirmed with costs.

CHAUNCEY SMITH, RESPONDENT, v. ADOLPH FRANKFIELD, APPELLANT.

*Judgment based upon former judgment against defendant—reversal of such former judgment—effect thereof.*

13 489  
76 61

In an action brought to recover damages for a breach of a covenant of seizin the plaintiff, to prove the breach, put in evidence a judgment recovered by one Smith against the defendant establishing a lien in favor of Smith upon the property and a *lis pendens* filed at the commencement of that action. After a recovery of judgment by the plaintiff the judgment recovered by Smith was reversed, upon appeal, by the General Term.

Upon an appeal by the defendant from the judgment recovered by the plaintiff, and from an order denying a motion for a new trial, *held*, that a new trial should be granted upon payment by the defendant of the costs of the first trial and of this appeal, and of ten dollars costs of opposing the motion below.

APPEAL from a judgment in favor of the plaintiff entered upon the trial of this action by the court without a jury, and from an order denying a motion for a new trial made at Special Term.

This action was brought to recover damages for a breach of a covenant of seizin contained in a conveyance of certain real estate bearing date April 15, 1873, from the defendant to the plaintiff.

A notice of *lis pendens* describing the property in question had been filed April 2, 1873, in an action brought for the foreclosure of a mechanic's lien. In the latter action judgment in favor of the plaintiff and sustaining the lien was rendered in January, 1875. This action on the covenant of seizin was prosecuted to judgment and judgment rendered in favor of the plaintiff in July, 1876, the notice of *lis pendens* and judgment in the mechanic's lien case being received in evidence on the trial thereof for the purpose of establishing a breach of the covenant. From this judgment of

July, 1876, defendant appealed. After the recovery of the judgment in the action brought on the covenant of seizin, and pending the appeal therefrom, the judgment in the mechanic's lien case was reversed on appeal at the General Term.

A motion for a new trial in this action was thereupon made at Special Term pending the appeal to the General Term, which motion was denied.

*Charles Tracy*, for the appellant.

*Wm. P. Fiero*, for the respondent.

INGALLS, J. :

This cause comes before this court, under circumstances somewhat peculiar. The defendant conveyed certain land to the plaintiff by deed, containing a covenant of seizin. The plaintiff was entitled to recover by establishing a defect in the title without waiting until he should be dispossessed. He brought an action in this court against the defendant to enforce such covenant, and recovered a judgment. Upon the trial to establish a breach of the covenant the plaintiff put in evidence a judgment-roll, in an action prosecuted in this court by one Sarah H. Bostwick against the defendant herein, to enforce an equitable lien which she claimed to have against the said premises. A notice of *lis pendens* was also put in evidence, which was filed at the time of the commencement of the last-mentioned action. The judgment-roll showed a recovery by Mrs. Bostwick, in that action. Smith, the plaintiff in this action, relied upon the trial, mainly upon the judgment recovered by Mrs. Bostwick against the defendant Frankfield, and the notice of *lis pendens*, to establish a breach of such covenant.

The defendant Frankfield appealed to the General Term from the judgment rendered in favor of Sarah H. Bostwick against him, and the judgment was reversed. (See *Bostwick v. Frankfield*, 18 Sup. Ct. Rep. [11 Hun], 476, where the questions of law and fact are fully and ably discussed by Judge BRADY.) Pending this appeal from the judgment in favor of *Smith v. Frankfield*, a motion was made at Special Term, by the defendant, for a new trial, on the ground that the reversal of the judgment in the case

of *Bostwick v. Frankfield*, destroyed its efficacy, not only at the time of its reversal, but related back to the period of its rendition; and therefore, the ground upon which the plaintiff in this action relied to establish a breach of the covenant of seizin in his deed, wholly failed; in other words, was blotted out by such reversal. In *Hall v. Andrews* (65 N. Y., 572), Judge Lott remarks: "The reversal of the judgment in defendant's favor destroyed its efficacy as a bar, as it thereby became a nullity. The reversal acted retrospectively, its practical operation being to declare, that when the judgment was interposed as a defense, it had no validity." (*Wood v. Jackson*, 8 Wend, 10, 36; *Briggs v. Bowen*, 60 N. Y., 454.) It is proper to remark, that the decision at Special Term, denying the motion for a new trial in this action was denied *pro forma*, as the order shows. From an examination of the case upon this appeal, and of the decision of the General Term, in *Bostwick v. Frankfield*, and the papers furnished upon the appeal from the order denying such new trial, we are convinced that this appeal can only be properly disposed of by reversing the order of the Special Term and directing a new trial, but this should be upon terms. When the plaintiff recovered his judgment, the decision in *Bostwick v. Frankfield*, was in force, and he was entitled to rely upon it.

The defendant appealed to this court and thereby occasioned the costs upon this appeal. We perceive that the appellant's counsel in his points, likens his application to that of a motion for a new trial on the ground of newly-discovered evidence. Such a motion is granted upon the payment of costs. (*Bailey v. Park*, 5 Hun, 41; 3d vol., Waite's Practice, 511.) As a condition to granting such new trial the defendant should be required to pay the costs of the plaintiff upon the trial at the Circuit, and upon this appeal, and ten dollars costs of opposing the motion at Special Term. We deem this a just disposition of this appeal.

DAVIS, P. J., and BRADY, J., concurred.

New trial granted upon defendant paying plaintiff's costs upon the trial at Circuit and on appeal, and ten dollars costs of opposing the motion at Special Term.

WILLIAM HERRIES, APPELLANT, v. EDWARD B. WESLEY  
AND THOMAS C. PLATT, IMPLEADED WITH OTHERS,  
RESPONDENTS.

*Chap. 40 of 1848 — trustees of corporation must be stockholders — how the fact that a person is a stockholder may be proved.*

Chapter 40 of 1848 requires that the trustees of the corporations created thereunder shall be stockholders of the company; defendant had signed and acknowledged the articles of association of a corporation created thereunder, and was named a trustee therein.

*Held*, in an action brought by a laborer under section 18 of said act to charge him individually with the payment for services rendered to the company, that he could not deny that he was, at the time of signing the articles, a stockholder thereof.

Where one has been shown to be a stockholder at the time of the organization of the company, he will be presumed to continue to be one until the contrary is established.

Section 25 of said act providing that the book containing the names of the stockholders which the company is required to keep "shall be presumptive evidence of the facts therein stated in favor of the plaintiff in any suit against any stockholder," does not make such book the only or even the best evidence of the fact that the defendant was a stockholder.

APPEAL from a judgment in favor of the defendants, entered upon the report of a referee.

*Denis A. Spellissey*, for the appellant.

*William H. Arnough*, for the respondents.

INGALLS, J.:

This action was brought by the plaintiff to recover for services rendered by himself and his assignors, as laborers of the "New York Republican Newspaper Association," against the defendants as the stockholders of such corporation. It was established upon the trial that the services were rendered as claimed. That the above-named association was duly incorporated under the Laws of 1848, chapter 40.

The referee decided the case upon the ground that the plaintiff had failed to prove that the defendants, *or either of them*, were

stockholders at the time the debts were contracted. This presents the only question to be considered upon this appeal. The articles of association were put in evidence, by which it appears that the defendants signed and acknowledged them, and were therein named two of the trustees.

The referee in his report, finds as follows: "Ninth, that the plaintiff has failed to prove that the above-named defendants, Wesley and Platt, *or either of them*, were stockholders in the "New York Republican Newspaper Association" at the time the debts were contracted, upon which this action is brought. The eighteenth section of said act of 1848 provides, "the stockholders of any company organized under the provisions of this act shall be jointly and severally, individually liable for all debts that may be due and owing to all their laborers, servants, and apprentices, for services performed for such corporation." The third section of the same act provides: "The stock, property and concerns of such company shall be managed by not less than three, nor more than nine *trustees who shall be stockholders in such company*." The articles of association furnish, at least, *prima facie* evidence that the defendants were stockholders at the time the company was organized. They are, in law, presumed to have understood the relation which they bore to the corporation, which they were instrumental in creating. To be trustees they were *required to be stockholders*, and in that capacity they presented themselves to the public, and should not be allowed to deny that relation to the corporation against persons who have rendered services as laborers for such association, upon facts such as were established upon the trial.

Having been thus shown to be stockholders at the time the corporation was formed, they will be presumed to continue such until the contrary shall be established. (*Strong v. Wheaton*, 38 Barb., 617, 622; 1 Greenleaf on Ev., 3d p., 105, § 41.)

The mere fact that the book offered showed that *Wesley* had resigned as trustee, did not destroy the presumption that he was a stockholder, which he might well continue to be, although not a trustee; for while he could not, legally, be a trustee without being a stockholder, he might very consistently be a stockholder and not a trustee. The twenty-fifth section of the act provides for keeping

a book to contain the names of the stockholders, and declares that "such book shall be presumptive evidence of the facts therein stated in favor of the plaintiff in any suit against any stockholder." The statute does not declare that it shall be the only evidence, or even the best evidence. This provision of the statute cannot properly be held to exclude the evidence offered at the trial.

The complaint should not have been dismissed by the referee upon the facts proved by the plaintiff.

The judgment should be reversed, with costs to abide the event.

DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed, new trial ordered, costs to abide event.

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JOHN SNAPE, APPELLANT, v. HENRY GILBERT, JAMES N. BROCK AND JOHN F. BRODERICK, RESPONDENTS.

*Answer — return of, because of a defective verification — notice must point out defect.*

Where an answer is returned on the ground that the verification of the same is defective, the notice must point out specifically the particulars in which it is defective.

APPEAL from an order of the Special Term compelling the plaintiff to accept an answer served by the defendant Gilbert.

This action was brought against the defendant Gilbert, as receiver of the assets of a firm, and against the other two defendants who were sureties upon his bond, to recover for a breach thereof.

Each of the defendants served a separate answer and verified it as follows, viz.:

"CITY AND COUNTY OF NEW YORK, ss.:

Mathew H. Gilbert, being duly sworn, says: That he is the son of this defendant.

That he has read the foregoing answer and that the same is true to his own knowledge.

That the reason this verification is made by deponent is that said defendant Gilbert is absent from home and not here to make the same.



That said Gilbert resides at No. 627 West Fifty-first street, New York, and all the allegations contained in the foregoing answer are within the personal knowledge of this deponent."

The verifications differ from each other in the names of the defendants mentioned therein, but were all verified by M. H. Gilbert and were substantially alike. The plaintiff returned the answers, indorsing on each the following notice:

*"To DAILY, Jr., & MACHIN, Attorneys for Defendants :*

Please take notice that the plaintiff refuses to receive and hereby returns the within answer on the ground and for the reason that the same is not properly verified and will treat the same as a nullity."

*Isaac L. Miller, for the appellant.*

*Daily & Machin, for the respondents.*

INGALLS, J. :

The main objections to the verification to the answers are two :

First, That it is not therein stated that Matthew H. Gilbert was at the time the agent or attorney of the defendants.

Second, That it is not stated that the defendants were not, at the time, within the county of New York.

The verification is not a strict compliance with the statute, although for all practical purposes, it is a substantial compliance. It is therein stated by Matthew H. Gilbert, who verified the answers, that he is a son of one of the defendants, and had heard read the answer, and that the same was true of his own knowledge; that the reason why he made such verification was that the defendant Gilbert was absent from home, and not there to make the same; that all the allegations of the answer were within his personal knowledge. In a case, where there is a substantial compliance with the statute, and no evidence of intentional evasion of its requirements, the court is justified in holding the party objecting to the sufficiency of a verification, to strict practice on his part.

The notice which accompanied the papers, which were returned, is as follows: "Please to take notice that the plaintiff refuses to

receive, and hereby returns the within answer, on the ground and for the reason that the same is not properly verified, and will treat the same as a nullity."

This notice was too general. When a paper is returned on the ground of irregularity the objection must be stated explicitly, and the particular defect, or omission, should be pointed out, so that the other party may understand wherein his papers are defective. The rule was intended to accomplish this result. (*Chemung Bank v. Judson*, 10 How., 133; *Broadway Bank v. Danforth*, 7 How. 264; *Sawyer v. Schoonmaker*, 8 How., 198.)

The judge at Special Term made a proper order, which should be affirmed with costs.

DAVIS, P. J., and BRADY, J., concurred.

Order affirmed with costs.

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ISABELLA HAY, RESPONDENT, v. THE STAR FIRE INSURANCE COMPANY, APPELLANT.

*Policy of insurance — reformation of — limitation of time to bring action upon — when the time commences to run in such case.*

The plaintiff, in June, 1867, held a mortgage for \$2,500 containing the usual insurance clause. On June twenty-eighth the defendants issued to the plaintiff a policy for \$2,500 insuring her as mortgagee. In June, 1868, plaintiff took another mortgage for \$500 on the same property also containing the insurance clause. Plaintiff applied for a new policy to cover both amounts. The policy was not delivered at the time of making the application, but was subsequently received by the plaintiff and accepted without examination. This new policy contained an additional clause, providing that the company should only be liable for any deficiency that might remain after the plaintiff had exhausted the primary security. The second policy was renewed from time to time until October, 1873, when the property was destroyed by fire, and plaintiff then, for the first time, discovered that the additional clause had been inserted.

In an action by the plaintiff to reform the policy by striking out this clause, *held*, that the insertion of this clause by the defendant without notice to the plaintiff was, in legal contemplation, a fraud, and that the same should be stricken therefrom.

The policy provided that no suit or action for the recovery of any claim by virtue of the policy should be sustainable in any court, unless it was brought within twelve months after the loss had occurred.

*Held*, that the clause in the policy as written, requiring the primary security to be first exhausted, was inconsistent with such a provision and that it did not, therefore, apply to the case of insurance of the interest of a mortgagee; that under the contract, as it was claimed to be by plaintiff, the cause of action did not accrue until the entry of the judgment reforming the policy.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

Plaintiff, in the month of June, 1867, was the holder of a mortgage for \$2,500, made by Nathan Smith and Jane, his wife, covering premises in Westchester county. The mortgage contained the usual insurance clause. On the 28th of June, 1867, defendants insured the plaintiff in the sum of \$2,500 on "her interest as mortgagee" in the premises in question.

In June, 1868, the plaintiff loaned the mortgagors the further sum of \$500 taking a new mortgage therefor, which also contained an insurance clause, and applied to defendants for a renewal of the policy of insurance, then about to expire, and for an increase of the risk to the sum of \$3,000 in order to cover the additional mortgage indebtedness.

The new policy was not made out or delivered at the time of the agreement of renewal but subsequently thereto, and plaintiff received the same without examination supposing it to be in conformity with the agreement. The new policy did not, however, conform to, and was not a renewal of the first policy. The essential feature of difference consisted in the insertion in the new policy of the clause, *i. e.* :

"In all cases of loss the assured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with a power of attorney to sue for and recover the same at the expense of this company. When insured as a mortgagee the loss shall not be payable until payment of such portion of the debt shall have been enforced, as can be collected out of the original security to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security."

The plaintiff did not examine the policy when delivered, and had no notice or knowledge of the existence of the clause in question or that the policy was not made out in conformity with defendants'

agreement, until subsequent to the destruction of the premises by fire in October, 1873, when her attention was for the first time called to the fact by the refusal of the company to pay.

The insurance had been renewed from time to time, such renewals being effected by means of receipts for the annual premiums and not by the making and issuing of new policies.

On the 9th of October, 1873, the premises were destroyed by fire. The plaintiff gave due notice of the fire and furnished proofs of loss and applied to the defendants for payment of the insurance, which being refused this action was, in January, 1875, commenced for a reformation of the policy to conform to the agreement made by defendants and for the recovery of the amount of loss.

It appeared in evidence on the trial that the premiums of insurance were uniformly and in all cases paid by the mortgagors. No question was raised on the trial either as to the amount of the loss or the form or sufficiency of the proofs. The policy contained the following provision as to the bringing of actions thereon :

"It is furthermore hereby expressly provided and mutually agreed that no suit or action against this company for the recovery of any claim, by virtue of this policy, shall be sustainable in any court of law or chancery, until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next after the loss shall occur; and should any suit or action be commenced against the company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The court found that the policy was not in conformity with the agreement made by the company, and adjudged that the same should be reformed in conformity with the prayer of the complaint, and that plaintiff should recover from the defendants the amount of the insurance.

*Osborne E. Bright*, for the appellant.

*Charles A. Davison*, for the respondent.

BRADY, J. :

The plaintiff, in June, 1867, held a mortgage as mortgagee, for the sum of \$2,500. It was made by Nathan Smith and Jane, his wife.

It contained the usual insurance clause. On the 28th of June, 1867, the defendants insured the plaintiff in the sum of \$2,500, on her interest as mortgagee. In the following June, the plaintiff loaned the further sum of \$500 and took a new mortgage, which also contained the insurance clause; she then applied through her agent for a renewal of the policy from the defendants, then about to expire, for the sum of \$3,000, to cover the two sums of \$500 and \$2,500, loaned as stated. The new policy was not delivered when applied for but was subsequently received without examination. It did not conform to the policy first secured and for \$2,500, inasmuch as it contained the following clause which was not found in the old policy.

“In all cases of loss, the assured shall assign to this company all his right to receive satisfaction therefor from any other person or persons, town or corporation, with the power of attorney to sue for and to recover the same at the expense of this company. When insured as a mortgagee, the loss shall not be payable until payment of the debt shall have been enforced, as can be collected out of the original security to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security.”

The plaintiff did not examine the new policy and had no knowledge or notice of the new clause, or that the policy was not made out in conformity to the application for a renewal, until after the destruction of the premises by fire. Upon these, which are the material facts, the plaintiff sought a reformation of the contract and succeeded on the trial in obtaining the relief asked. The testimony clearly warrants the conclusion that the policy for \$3,000, was to be such a policy as had previously been given, and that no notice of the addition or intended addition of the clause mentioned had been given to the plaintiff or to her agent. There can be no doubt, either, that the new policy accomplished an entirely different relation between the parties to that which had pre-

viously existed, and there can be no doubt, either, that if the policy for \$2,500 had been retained the demand made upon it could not be answered by the text of the clause mentioned, because it was not contained in the agreement. (*Excelsior Insurance Co. v. The Royal Ins. Co.*, 55 N. Y., 343.)

The clause itself is open to the objection, that it is an insurance of the debt and not of the property, and is not only not the agreement the plaintiff sought, but, so far as defendants are concerned, was *ultra vires*. They could not take such risks. (*Case, supra.*) The insertion of the new clause without notice, was, under the circumstances disclosed, in legal contemplation, a fraud. The plaintiff did not ask for it. It was not spoken of and was unauthorized. The reformation of a contract upon such facts and such legal conclusion of fraud is almost matter of course. When the plaintiff applied for a renewal and it was agreed upon, it meant the repetition of the policy in terms which had been agreed upon. The rules which govern applications of this kind have been elaborately discussed, in many cases, and it may be supposed that some of them are settled so as to be securely applied.

It can be said, it seems with certainty, that fraud need not be expressly charged. It is sufficient if it is fairly deducible from the facts established. And further, that where it exists the relief sought will be granted and the contract reformed. The insertion of such a clause as mentioned, without an agreement therefor or notice, was as already suggested, a fraud in legal contemplation. (*Story's Equity Jur.*, §§ 154, 155; *Lyman v. The United Ins. Co.*, 17 Johns., 373; *Bidwell v. The Astor Mutual Ins. Co.*, 16 N. Y., 263; *Rider v. Powell*, 28 id., 310; *Welles v. Yates*, 44 id., 525.)

A careful examination of the case has not revealed error in the findings or the validity of any exception taken. The testimony on the part of the defense in some respects corroborates that given on behalf of the plaintiff. It is true that neither the plaintiff's agent nor herself read the first policy, but it is also true that both supposed they had secured immunity from loss if the property was destroyed to which the policy applied. This was the object they had in view and this was accomplished by the first policy. The fact of their not having read it, did not justify the defendant in substituting one differing from it in an important respect without notice,

which, as already suggested, was not given in this case. The testimony with regard to this new policy leads to the conclusion that the plaintiff's agent wanted and supposed that he would obtain insurance upon the property and not of the debt, and that if the property were destroyed by fire the plaintiff would be paid.

It is said, however, assuming that the policy should be reformed, the plaintiff cannot succeed because this action was not commenced within twelve months after the loss occurred, but there are answers to the proposition which seem to be conclusive. The policy issued contained the following clause: "When insured as a mortgagee, the loss shall not be payable until payment of such portion of the debt shall have been enforced as can be collected out of the original security to which this policy may be held as collateral, and this company shall then only be liable to pay such sum, not exceeding the amount insured, as cannot be collected out of such primary security." It will be perceived, however, that it contemplates the adoption of all the proceedings necessary to obtain from the original security the payment of the debt to which the policy relates, and that the defendant shall be called upon to pay only such sum as cannot be thus collected. It is, perhaps, not necessary to say that this is wholly inconsistent with the covenant requiring the commencement of an action within twelve months, because the enforcement of the demand secured by the mortgage might involve years of litigation which must be exhausted before the defendant's liability would accrue. The provision does not, therefore, apply. It is designed to cover only the claims which originate in the loss of property insured, and as to which the defendants are primarily liable. This is our conclusion on the policy, as it exists. If, however, we consider the proposition with reference to the contract as the plaintiff avers it to have been made, then the answer is that the action, to be commenced under the provisions of the policy for the loss, does not accrue until the judgment reforming it is pronounced.

The effect of changing the policy, is, therefore, substantially to render nugatory the limitation under consideration.

We think the judgment should be affirmed, with costs.

DAVIS, P. J., and INGALLS, J., concurred.

Judgment affirmed, with costs.

ISAAC V. FRENCH, AS RECEIVER OF THE CENTRAL PARK SAVINGS BANK IN THE CITY OF NEW YORK, APPELLANT, v. JOSEPH E. REDMAN AND OTHERS, RESPONDENTS.

*Trustees of savings bank — purchase of real estate by — when unauthorized.*

A savings bank in New York was incorporated in 1867. During the years 1867, 1868 and 1869 the expenditures exceeded the receipts; in 1870 and 1871 the receipts were in excess of the expenditures, and in 1872 and 1873 the expenditures again exceeded the receipts. In the latter year the trustees of the bank purchased four lots, three of which were sold, and on the fourth a banking house was erected. This action was brought by a receiver of the bank against the trustees to recover damages alleged to have been sustained by the bank from such purchase, on the ground that, as the charter limited the power of the trustees to purchase real estate to a lot and banking-house, that the purchase of the four lots by the trustees when they needed but one, and the purchase of even one lot in the then condition of the bank, was an abuse of discretion, and illegal and unauthorized.

*Held*, that the question as to whether or not the purchase of the land, considering the financial condition of the bank, was a reasonable exercise of the discretion vested in the trustees, was a question for the jury, and that it was error for the court to withdraw that question from them.

APPEAL from a judgment dismissing the complaint entered at the Circuit, and from an order allowing separate bills of costs to each of the defendants.

The action was brought by the plaintiff, as receiver of the Central Park Savings Bank, against ten of its trustees to recover some \$15,000 claimed to have been lost by reason of an illegal purchase of real estate. The power of the trustees to purchase real estate was limited by the amended charter to "a lot and banking-house requisite for the transaction of its business, and for an income from such parts of the same as are not required for its own use." By deed dated May 1, 1873, the bank bought of Anson Backus a piece of land at the north-west corner of Third avenue and Forty-eighth street, in the city of New York, for \$74,500. The premises embraced four lots, three fronting on Third avenue, and one in the rear, fronting on Forty-eighth street. The conveyance was not made directly to the bank, but was made to Gearty, Cary and Redman, three of the trustees, who afterwards conveyed as the bank



directed. The trustees, however, bought for the bank, and the consideration was paid by the bank's money. Subsequently they conveyed lot No. 1 to the bank and a banking-house was erected thereon. The other three lots they conveyed to different individuals. Counsel for plaintiff claimed, taking the transaction as a whole, and charging the cash paid out, with broker's fees, interest, taxes, etc., down to the time the receiver was appointed, and crediting the prices received for the parts sold, with interest, and estimating the lot on hand (as distinguished from the lot and building), there was, in round numbers, a loss of \$15,205.55. It was also claimed by him that the bank was insolvent at the time of the purchase. It appeared that the bank was incorporated in 1867; that during the years 1867, 1868 and 1869 the expenditures exceeded the receipts; that during the years 1870 and 1871 the receipts were in excess of the expenditures, and that in 1872 and 1873 the expenditures again exceeded the receipts.

Plaintiff on the trial claimed: First, that the purchase of four lots, when one only was requisite for, and intended for, a banking-house, was illegal, and subjected the trustees concerned in it to all the loss sustained thereby. The defendants claimed that the loss, if any, in the transaction was on the corner lot, No. 1, the purchase of which, if it had been made alone, was authorized by the charter. The plaintiff claimed that the purchase being in gross, it was impossible to distinguish or apportion the loss, and that the defendants were liable for the whole. Secondly, the plaintiff claimed that in the then condition of the bank, which was insolvent, and had been running behind for several years, it was an act of gross negligence and mismanagement (even if the purchase of all the lots were legal) to invest all the available assets in a bank building. And the plaintiff asked to go to the jury on this question.

The court disposed of the first point by holding that the evidence showed that the three lots, Nos. 2, 3 and 4, did not cause a loss. On the second point, the court held that there was no evidence of a want of due care, skill and judgment sufficient to go to the jury on.

*F. C. Barlow*, for the appellant. As to the gross negligence of the trustees in making the purchase in view of the financial condition of the bank, the counsel cited: *Pontchartrain Railroad Company v.*

*Paulding* (11 Louis [O. S.], 41; 6 Louis Cond. R., 30); *Percy v. Millondon* (3 Louis [O. S.], 568; 2 Louis Cond. R., 364); *Attorney-General v. Sutton* (1 Craig & Phil., 1); *Morse on Banking* [ed. of 1870], 116 *et seq.* Some point was made that certain of the trustees were not present at the meetings at which the purchase was made, and hence are not liable. Trustees are not heard to say that they did not know the acts of their corporations. (See *Palmer v. Yates*, 3 Sand., 127, and at pp. 159, 160; *Osgood v. Laytin*, 5 Abb. [N. S.], 1, and at p. 9; *Morse on Banking* [ed. of 1870], at foot of p. 118; *Bank Comrs. v. Bk. of Buffalo*, 6 Paige, 497.)

*E. Ellery Anderson*, for the respondents. Trustees are not liable for losses resulting from mistake either of fact or of law. (*Scott v. De Peyster*, 1 Edw. Ch., 513; *Miller v. Proctor*, 20 Ohio St., 442; *Gobold v. Branch Bk. of Mobile*, 11 Ala., 191; *Hodges v. N. E. Screw Co.*, 1 R. I., 312; *Harman v. Tappenden*, 1 East, 555; *Overend v. Gurney*, 4 Ch. Ap., 701; *Green's Brice's Ultra Vires*, note, 407, 408.)

BRADY, J.:

Assuming that the purchase of four plots of land were necessary for the banking-house contemplated by the resolution to build, it appears that three of the plots were sold, and as the result the plot left cost \$29,250. This, it would seem from the evidence, was a fair price for it when purchased, although by the depreciation in real estate it was not worth more than \$22,000 when this action was tried. If it was fairly worth the sum which it cost when it was bought, then no charge of improvidence or wrong can be sustained unless the purchase itself, under the then existing circumstances, was wholly unwarranted. It is a notorious fact that real estate has, during the period of five years last past, depreciated in all the States and in Europe, a result from causes to which it is not necessary to refer. It is equally notorious that loans made upon real estate in this county, and elsewhere situate, and by corporations exercising care, have not been realized by the sale of the securities pledged, owing to the depreciation mentioned.

The difference between the values of 1873, 1875, 1876 and 1877 are easily accounted for, therefore, and readily understood. The

mere fact of the depreciation is consequently insufficient to sustain any charge of wrong done, and suggests the inquiry, as already intimated, whether the purchase was unjustifiable. The bank was not at the time the land was selected a success, and nothing in the case revealed warrants the conclusion that it would be. During its existence, except for the years 1870 and 1871, its outlays were more than its receipts; and in 1872, the year succeeding the last prosperous year, the amounts paid out exceeded the sums received by more than \$2,000. The land was purchased in 1873, and in the year succeeding that in which as just stated the outlays exceeded the receipts. How could it, then, be possible that any new building was necessary for the business of the bank beyond what it occupied, and if it was not, how can the purchase of the excessive plots be construed as other than an intention to speculate, and thus, if successful, increase the assets of the bank? It is true that the right to the exercise of their judgment and discretion may protect its officers, but these elements of human action must rest upon something other than mere caprice, and upon something which has substance, some thing which business men would estimate as of value, and sufficient for operations connected with the subject to which it related. For these reasons, without any extended examination of the authorities kindred to the subject, it is quite apparent that whether the discretion was abused is a question for determination. The learned justice presiding at the trial so treated the issues presented. He proclaimed that there was nothing in the case to show that at the time the purchase was made it was such an excess of authority on their part or such a want of judgment as to make them personally liable for the result. In this we think he may have been mistaken, and that under the circumstances the question was a proper one for the jury to consider and decide. The facts detailed are sufficient to demonstrate that a jury might regard the purchase as one which the financial condition of the bank did not at all warrant, and draw thence the conclusion of wrong intended or liability incurred by unjustifiable expenditure.

The defendants would have the benefit on the investigation of the charge against them of such evidence as they might present in defense, and of the doctrines of ignorance of the facts, of innocence and of good faith so far as they could be applied, and might clearly

exculpate themselves from all imputation. The evidence given called upon them to respond. There was a *prima facie* case against them, which demanded consideration at the hands of the jury. The respondents placed great confidence in the case of *Scott v. De Peyster* (1 Edw. Ch., 513), and with some plausibility, as an authority for the proposition that on the facts disclosed the defendants are relieved from all liability, there being no charge of dishonesty or willful wrong established against them.

A careful examination of that case dissipates the thought of its advantage to them, as assumed. So far as it bears analogy to this case, the result is that the conduct of the trustees was regarded as an innocent mistake or error of judgment.

The circumstances were peculiar, but fully sustained the conclusion expressed. Whether the conduct of the defendants complained of was an innocent mistake or a mere error of judgment, it was the province of the jury to determine, and from which they were prevented by the dismissal of the complaint. We think the case should have been submitted to the jury, and that the omission to allow it to be done was error.

Judgment reversed, with costs to abide event.

DAVIS, P. J., and DANIELS, J., concurred.

Judgment reversed and new trial ordered, costs to abide the event.

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THE BERKSHIRE WOOLEN COMPANY, PLAINTIFF, v.  
AUGUSTUS D. JUILLARD, RECEIVER, AND OTHERS,  
DEFENDANTS.

*Bond signed by partners individually — when it constitutes a firm obligation —  
Remedy against the individuals and also against the receiver of the firm.*

In April, 1873, two mills in the State of Connecticut were indebted to the firm of Hoyt, Spragues & Co., in the sum of \$1,000,000, the payment of which was guaranteed to them by one Chapin; one of the members of the firm, acting in behalf of the firm and of Chapin, applied to certain banks for the purpose of procuring a loan of \$600,000, which loan was made upon the execution of a joint and several bond for that sum by Chapin as principal, and by the indi-

vidual members of the firm of Hoyt, Spragues & Co., as sureties, and of a mortgage as collateral thereto, given by Chapin. The money arising from the loan was applied upon the debt guaranteed by Chapin. Subsequently the firm of Hoyt, Spragues & Co. became insolvent, and default having been made in payment of the interest, the mortgage was foreclosed. In this proceeding it was sought to recover from the receiver of the firm assets, the deficiency arising upon the sale.

*Held*, that as the bond, although signed by the members of the firm, as individuals, was in fact given to secure the payment of a debt due to the firm, and was for its benefit, it was, therefore, a firm obligation, and was payable out of its assets.

*Held*, further, that the fact that actions had already been commenced in this court against the surviving sureties, and the executors of those who were dead, did not prevent its enforcement against the firm.

APPEAL from an order made at the Special Term overruling exceptions to the report of a referee.

By the decree in this action, dated January 6, 1876, it was adjudged that the firm of Hoyt, Spragues & Co. was insolvent, and that the estate, assets and effects of said firm in the hands of the defendant Juillard, receiver, constituted a fund, out of which the plaintiff, a creditor of said firm, and other creditors, upon proof of their claims, were entitled to be paid in accordance with their respective rights.

William P. Dixon, Esq., was by said decree appointed referee, to take proof of the claims of the creditors of Hoyt, Spragues & Co., filed with him, and of any objection thereto, and to determine the validity of such claims so presented to him.

Five savings banks in Providence, viz.: The People's Savings Bank, the Franklin Institution for Savings, the City Savings Bank, the Union Savings Bank, and the Cranston Savings Bank, accordingly filed with the referee a claim (No. 499) against the assets of the firm of Hoyt, Spragues & Co. Proof was taken in support of said claim, and when the claimant rested the counsel for the receiver moved to dismiss the claim. The motion was granted by the referee. Before the filing of the referee's report the claimants requested the referee to make certain findings of fact. He declined to do so, and the claimants duly excepted. The referee thereupon filed his report, to which exceptions were duly filed by the claimants. The claim filed with the referee is based upon a bond made by Josiah Chapin, as principal, and the several members of the firm

of Hoyt, Spragues & Co., viz.: Edwin Hoyt, William Brenton Green, Amasa Sprague, William Sprague, Nehemiah Knight and Albert S. Gallup, as sureties, to the banks above named. The bond in terms bound the obligors in the sum of \$1,200,000, and for the payment of that sum the obligors "bind themselves and each of them, and any six, five, four, three or two of them, their and each of their and any six, five, four, three or two of their heirs, executors and administrators, jointly, severally and respectively, firmly by these presents."

The receiver's counsel and the counsel for plaintiff in the above-entitled action filed objections to the claim being entertained by the referee, which may be briefly stated as follows, viz.: The claim as presented is not a claim against the assets of the firm of Hoyt, Spragues & Co. It is, at best, a claim against the several estates of the members of said firm and against their joint estates, but not against their partnership estate.

Evidence was offered by the claimants and appellants before the referee tending to establish that for some time prior to the 4th of April, 1873 (the date of the bond), the Riverside Mills and the City Woolen Company had had business relations with the firm of Hoyt, Spragues & Co., and were then indebted to that firm in an amount exceeding \$1,000,000. Josiah Chapin, of Providence, the principal obligor of the above-mentioned bond, had duly guaranteed the indebtedness of the Riverside Mills and the City Woolen Company to Hoyt, Spragues & Co. Mr. Gallup, one of the above-named sureties, and a member of said firm of Hoyt, Spragues & Co., acting on behalf of such firm, negotiated a loan from the above-named banks, the claimants, of \$600,000 for the purpose of enabling Mr. Josiah Chapin to reduce the indebtedness of the respective mills above named to the firm of Hoyt, Spragues & Co., which the mills were unable to pay, and for which he (Chapin) had become guarantor. For the purpose of accomplishing this object and loan, Mr. Gallup, acting on behalf of the firm of Hoyt, Spragues & Co., visited the banks in Providence, and accordingly arranged the matter, as hereinafter stated. The banks acceded to the proposition on the following terms: A bond to be executed for the sum of \$1,200,000 by Mr. Josiah Chapin, as principal, and the members of the firm of Hoyt, Spragues & Co., as sureties, the bond to bind the joint and seve-

ral estates of the members of the said firm. As additional security for said bond, Josiah Chapin was to execute and deliver to certain trustees a mortgage upon certain real estate situated in Providence. The sureties named in the bond were to covenant with Josiah Chapin that they, and not the said Josiah Chapin, should pay the interest on the bond and the taxes, etc., on the real estate so mortgaged. The money was to be paid on the order of Chapin directly to Hoyt, Spragues & Co. The agreement so entered into was carried out. The first six months' interest was deducted from the loan. The second six months' interest was paid by the firm of Hoyt, Spragues & Co. The banks not having advanced, *inter sese*, an equal amount of money towards the loan, in order to designate, as between themselves, the exact amount which each had advanced to the common pool, required Mr. Chapin to deliver simultaneously with the execution of the bond and mortgage to each of them his promissory note, "for the sake of convenience," for the several sums of money which each bank advanced to the common loan. The notes were so executed and delivered for the purpose designated, *i. e.*, "for the sake of convenience," and it was so expressed in the bond. Default was made in the payment of the principal, and thereupon the trustees named in the mortgage duly disposed of all the real estate, and after accounting for all the net proceeds of the sale, a deficiency exists on the bond to an amount exceeding \$325,000. The claim of the claimants and appellants consists of such deficiency.

*Chas. Tracy, Chas. M. Da Costa and L. H. Arnold, Jr.*, for The People's Savings Bank and others, claimants and appellants. The fact of the firm name not having been signed to the bond, though executed by all the members of the firm, does not prevent its being regarded as a firm obligation. (*Ex parte Hunter*, 1 Atk. Ch., 223, p. 225; *Galway v. Matthew*, 1 Campb., 403; *Filley v. Phelps*, 18 Conn., 295; *Agawam Bk. v. Morris*, 4 Cush., 99; *De Jarnett's Executors*, 31 Ala., 232, 233; *Burnley v. Rice*, 18 Texas, 481; *Harrison v. Jackson*, 7 T. R., 203.) The doctrine of election which prevailed in England at one time, as applied to cases like the present, has long since been exploded there. (*Ex parte Stone* [Law Rep.], 8 Ch. App., 914.) It never obtained a foothold in this country, for it is well settled by both State and national

authorities that where a valid claim exists against a joint and several fund in bankruptcy or in insolvency, it can be enforced against both, although, of course, it can only be collected once. (*In re Farnierer*, 6 Law R., 21; *In re Bigelow*, 2 N. B. R., 371, 373; id., 3 Ben., 146; 7 N. B. R., 217; *Mead v. Nat. Bk. of Fayetteville*, 6 Blatch., 180; Story's Eq. Jur., § 645; *In re Bradley*, 2 Bis., 517.)

*Thomas H. Hubbard*, for the plaintiff, respondent. A joint and several obligation in writing executed by partners in their individual names, and not in the name or style of the partnership, is not a partnership obligation. Nor can the holders, in case of insolvency, claim from the partnership funds. (Parsons on Part., 125, 126, 215; 1 Lindley on Part., 355; *Turner v. Jaycox*, 40 N. Y., 470; *Nat. Bk. of Salem v. Thomas*, 47 id., 15; *Forsyth v. Woods*, 11 Wal., 484; *Perring v. Hone*, 4 Bing., 32; *Crouch v. Bowman*, 3 Humph., 209; *Marshall v. Colman*, 2 Jac. & W., 266.) The parol testimony offered by the claimants to show that the bond was intended to create a partnership liability was wholly incompetent and immaterial, and the referee was right in not basing any finding upon it. (*Belloni v. Freeborn*, 63 N. Y., 383, 389; *Gates v. McKee*, 3 Kern., 232, 235; Greenl. on Evi., §§ 277, 282; *Brown v. Curtiss*, 1 Comst., 321; *Goodell v. Smith*, 9 Cush., 592, 594; *Poppenhusen v. Seeley*, 3 Keyes, 150, 153. Although at law the partners might be sued and the property of the firm as the joint property of six of the parties taken under execution, this has no bearing upon the distribution of partnership assets in equity after the firm has become insolvent. A bond signed by the members of a firm in their individual names, as sureties, is not a claim against the firm in bankruptcy or insolvency proceedings, even when the consideration passed to the firm. (Bump on Bankruptcy [9 ed.], 245; *In re F. F. Holbrook & Co.*, 2 Lowell's Dec., 259; *In re Webb v. Johnson*, 2 Bank. Reg., 614; *In re Bucyrus Machine Co.*, 5 Bank. Reg., 303; *In re Miller*, 1 N. Y. Leg. Obs., 38; *In re Herrick*, 13 Bank. Reg., 312; *In re Weston*, 12 Metc., 1; *Harmon v. Clark*, 13 Gray, 114, 122; *Gay & Co. v. Johnson*, 45 N. H., 587; *Maynard v. Fellows*, 43 id., 258; *Forsyth v. Woods*, 11 Wal., 484; *In re Roddin & Hamilton*, 6 Bis., 377.) The claimants have elected to proceed against the separate estates of the individuals who executed the



bond, and would thereby have waived their right to proceed against the joint estate had such a right ever existed. (Lindley on Part., 1013-1025; Collyer on Part., §§ 940-948; *Ex parte Hill*, 2 Dea., 249; Burge on Suretyship, 500; Avery & Hobbs on Bankruptcy, 308; *Mead v. Nat. Bk.*, 2 Bank. Reg., 177; *In re F. F. Holbrook & Co.*, 2 Lowell's Dec., 262, U. S. Dist. Ct. for Mass., 1877; *In re Howard, Cole & Co.*, 4 Bank. Reg., 577; *Mead v. Nat. Bk.*, *supra*.)

BRADY, J. :

It is, to my appreciation of the facts developed in this proceeding, quite apparent that the engagement of the members of the firm of Hoyt, Spragues & Co. as sureties for Chapin was directly connected with the interest, and therefore for the benefit, of the firm as such. The facts seem to leave no room to doubt this deduction. They were the creditors of Mr. Chapin, and one of them acting on behalf of the firm, and for Mr. Chapin as well, negotiated a loan from the claimants, the amount of which was to be applied to reduce the indebtedness of Mr. Chapin. The loan was made to him, and he was therefore the principal, but the members of the firm for considerations expressed in the instrument became sureties for the payment of the loan, which, through the instrumentality of one of its members, was accomplished and for the benefit of the firm. In other words, the money was thus obtained to pay a part of the indebtedness of Chapin to the firm, and in order to secure it they guaranteed its payment. The transaction was in effect a *quasi* loan to the firm, which they might or might not be called upon to refund, that incident depending upon the value of the pledge made by Chapin and his ability to meet the obligation imposed by the loan. The money having been thus received and used by the firm, their joint and several obligation was in legal effect, though not in precise terms, the undertaking of the firm for its benefit and advantage. The members of the firm by it assumed an obligation for their joint advantage as a copartnership, the whole transaction having no other object in view. When a joint obligation is executed by the individual members of a copartnership for a consideration passing to it, although it be not in the name of the firm, the liability incurred becomes one of the partnership, and when matured is enti-

tled to priority of payment out of the assets over the private debts of the copartners. There is no distinction in favor of debts directly contracted in the firm name. If the debt exists as one of the firm, its *status* is instantly determined. (*Ex parte Hunter*, 1 Atk. Ch., 225, and cases cited; *Galway v. Matthews*, 1 Campb., 403; *Filley v. Phelps*, 18 Conn., 295; *Agawam Bk. v. Morris*, 4 Cush., 99; *Turner v. Jaycox*, 40 N. Y., 470; *Forsyth v. Woods*, 11 Wal., 484.)

In the last case Mr. Justice STRONG said: "If a firm be composed of two persons associated for the conduct of a particular branch of business, it can hardly be maintained that the joint contract of the two partners made in their individual names, in respect to a matter which *has no connection with the firm business*, creates a liability of the firm as such." (See, also, *Franklin v. Fairchild*, 64 N. Y., 471.)

The reporter's note in *Turner v. Jaycox* (*supra*) does not seem to be warranted by the case. One of the questions therein considered was whether a note made by the members of a firm, though not in the firm name, and given for money used by the firm, was a partnership debt, and it was declared to be of that character. The doctrine that a joint note of individual partners was not, *per se*, a partnership debt was doubtless appended to prevent any misunderstanding of the opinion delivered. If such was not its object, then the reporter's note seems to have been unnecessary.

If the question be considered in reference to the intention of the contracting parties, there is little opportunity for discussion as to the intent. No other surety than those composing the firm was called upon to unite in the obligation given, and no one was interested in the consummation of the transaction but Chapin and the firm, but more particularly the latter, to whom the proceeds all went, and whose obligations to each other when the money was received immediately became those of partners *inter sese*. The money became assets at once, and becoming thus amalgamated, continues to be represented by what is left either in whole or *pro tanto*.

The counsel for the receiver seems to think that the claimants having commenced an action against the surviving obligors and the executors of Hoyt and Knight, they have waived any right to proceed against the joint estate, if such ever existed. This is an erroneous view of the effect of the procedure mentioned. In several

cases it has been held that the creditor had the right in bankruptcy to prove his debt against the firm and an individual member signing the obligation, and was not obliged to elect. (*In re Bigelow*, 2 N. B. R., 371, 373; *Emery et al. Assignees v. The Canal Nat. Bk.*, 7 id., 217; *In re Bradley*, 2 Bis., 517.)

The opinion of Justice CLIFFORD, in *Emery v. The Canal National Bank*, is elaborate and exhaustive, and the conclusion is in accord with what is stated. The assignee applied in that case to compel the claimant to elect, but the court declared he could proceed against both estates, namely, that of the firm and that of the individual partner. In *In re Bradley*, Justice MULLIN said: "I think the court has no judicial power to restrict the right of the creditor to pursue the joint and several debtors for the collection of his debt in the manner known to the law." If there be any restraint tolerable in such cases, there seems to be more propriety in requiring the creditor to pursue the joint property and to exhaust it before resorting to the individual estate, because the joint fund is primarily liable to the payment of joint obligations. Here the effort is to obtain payment out of the joint estate, and the effect, if payment be made, would be to increase the personal or individual property, and in that way to enlarge the security for the individual creditors. Although it may be justly said that there is some conflict of authority in regard to it, and which to some extent is discussed in the cases cited, nevertheless considering the organization of courts and the object of their creation, the dictates of reason result in the proposition that the creditor may seek the property of his debtor in whatever form it may be found, unless exempt by law, and the authorities cited sustain such a doctrine. Whatever estate may be applied, the debt can be collected but once, and until collected the creditor is by law entitled to his remedy.

For these reasons the exceptions to the referee's report should be sustained, the order appealed from reversed, and an order entered directing the referee to allow the claim of the appellants.

DAVIS, P. J., and DANIELS, J., concurred in the result.

Order reversed and order entered as directed in opinion.

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DUDLEY G. GAUTIER AND JOSIAH H. GAUTIER,  
RESPONDENTS, v. THE DOUGLASS MANUFACTURING  
COMPANY, THE RUSSELL & ERWIN MANUFAC-  
TURING COMPANY AND THOMAS J. S. FLINT,  
IMPLEADED, ETC., APPELLANTS.

*Purchaser of trust estate with knowledge of the trust — liabilities of — Sale of goods —  
implied warranty — notice of defects.*

A purchaser of a trust estate, with knowledge of the trust, is subject to all the duties in respect to the same which rested upon the trustee from whom he purchased.

In an action to recover the price of certain steel sold to be used in the manufacture of edged tools, the defense was that the steel was defective and of poor quality. It was admitted that the quality of the steel could not be ascertained without "working it up," and that an inspection and examination of it would not reveal its defects. *Held*, that the implied warranty that it was fit for the purpose for which it was sold in order to take advantage of the purchaser was not bound to test it at once and give notice of the defects, but that he was entitled to deduct the damages, sustained by reason of its imperfection, from the price, in an action brought to recover the latter.

APPEAL from a judgment in favor of the plaintiff rendered at Special Term, and from an order denying a motion for a new trial made on the ground of surprise, etc.

*L. R. Marsh*, for the appellants.

*John E. Parsons*, for the respondents.

BRADY, J. :

The plaintiffs are copartners in the business of manufacturing steel under the firm name of D. G. Gautier & Co.

The Russell & Erwin Manufacturing Company, one of the defendants, is a corporation established under the laws of Connecticut and located at New Britain, Connecticut, where its office and factories are situated. The company is engaged in the business of manufacturing and dealing in hardware, having its principal warehouse for the sale of goods in Chambers street, in the city of New York.

During the year 1873, and previous thereto and until April, 1874, Richard P. Bruff, also named as defendant in the complaint, was the managing agent of the Russell & Erwin Manufacturing Company's said warehouse in New York and held a written power of attorney from that company for the performance of certain acts in the execution and prosecution of its business at the city of New York, the nature and contents of which power of attorney are set forth in the answer of the company.

Previous to the year 1873 one Frederick L. Ames held the title of two certain factories for the manufacturing of mechanics' tools, one of the factories being known as the "F. L. Ames Chisel Works," situated at Arlington, Vermont, and the other as the "F. L. Ames Auger Works," situated at Seymour, Connecticut.

Said Ames carried on the business of these factories under the name of the "Douglass Manufacturing Company," and Thomas Douglass, also named in the complaint as defendant, claimed to have some equitable interest in said works and business. The goods manufactured at said works were consigned to the Russell & Erwin Manufacturing Company for sale upon commission and sent to the store of that company, in the city of New York, where said Bruff was stationed as manager as aforesaid. In January, 1873, by an arrangement on the part of Douglass and Bruff a purchase was made from said F. L. Ames of the said factories and the machinery, goods and materials there situated, and certain patent rights, and the same were conveyed to said Richard P. Bruff.

The price paid for this purchase was \$183,000, of which \$61,290.08 was paid to said Ames in cash and the remainder in four notes signed by Thomas Douglass, two of which, amounting to \$61,290.08, were indorsed by the defendant Thompson J. S. Flint, and two others, amounting to the like sum of \$61,290.08, were indorsed by said Bruff in the name and behalf of the Russell & Erwin Manufacturing Company. The cash paid as aforesaid was borrowed of said Thompson J. S. Flint, and the note of Thomas Douglass was given him for the same, as well as a note for a certain other amount given to him for commissions, for indorsing.

Richard P. Bruff, after receiving conveyance of said property, thereupon made and executed a written declaration of trust, dated January 30, 1873, in which, after reciting the conveyance of said

property to him, he also recites that the Russell & Erwin Manufacturing Company had agreed "to contribute and add thereto all the steel which might be required for the term of one year at said works, and then agrees that he will hold and manage said property, and conduct the business of said works, and the sale of the product thereof, under the name of the "Douglass Manufacturing Company," upon the trusts and for the benefits of the persons, firms and corporations thereafter named, which were :

First. To pay the expenses of the business. Then to pay Barney, Butler & Parsons certain promissory notes of Thomas Douglass, therein named. Then to pay Thompson J. S. Flint four certain promissory notes therein named, payable twelve months after date.

The instrument then provides that the business shall be wound up in case of default in the payment of any of the said notes to the said Flint, and for the sale of the property and the application of the proceeds to the payments provided for therein, but that otherwise the trust shall be continued for the following purposes :

First. To reimburse the "Russell & Erwin Manufacturing Company" for all sums expended by them for steel delivered by them to the trustee in the prosecution of said business.

Second. To pay to the Russell & Erwin Manufacturing Company two notes of Thomas Douglass, amounting to \$61,290.08, payable twenty-four months from date. These were the two notes before mentioned which had been indorsed by said Bruff in the name of the Russell & Erwin Manufacturing Company and delivered to said Ames.

The instrument then goes on to provide for the winding up of the business and sale of the property in case of default in the payment of any of said sums, and also for the transfer or payment to Thomas Douglass of any residue or balance of said property, or the proceeds thereof, that might remain after the payment of all the sums aforementioned.

The said Richard P. Bruff accordingly entered upon the execution of said trust and conducted said business from the date of said instrument until about July 24, 1874.

The goods manufactured at said works during said time were consigned to "The Russell & Erwin Manufacturing Company" for sale upon commission, and sales were made therefrom as well as

from the stock of goods which had been manufactured and sent to said store previous to Bruff's trusteeship, and which were held for sale in said store in manner as stated below.

In the meantime Bruff had paid out of the proceeds of said business the *current expenses thereof*, and had also paid in full the notes held by the said Barney, Butler & Parsons, and one of the notes held by the said T. J. S. Flint, and also had made the payment mentioned below.

At the time of the conveyance of the said real estate and factories and their contents to Bruff the Russell & Erwin Manufacturing Company held in their warehouse, in New York, a stock of manufactured mechanics' tools of the value of about \$100,000, which had been consigned to them for sale from said factories by F. L. Ames.

This stock of goods was at that time purchased by Douglass of Ames for \$100,000, Douglass giving Ames his promissory notes for that amount. By vote of the board of directors of the Russell & Erwin Manufacturing Company, Bruff, as the agent and attorney of that company, was authorized to guarantee the payment of those notes, taking said stock as security to indemnify the Russell & Erwin Manufacturing Company therefor. Under this authority Bruff indorsed said notes in the name of the Russell & Erwin Manufacturing Company and the stock of goods was held in the store of the Russell & Erwin Manufacturing Company, and sales were made therefrom by Bruff during the time of his continuance in said trust, and he paid out of the proceeds a portion of said notes, amounting to some \$60,000. The balance of said notes has since been paid by the Russell & Erwin Manufacturing Company.

The last-mentioned transaction, viz., the purchase of said stock of manufactured goods by Douglass and the guarantee of his notes therefor and the holding of the stock as security, was the only part of the arrangement at that time known to, or contemplated by, the board of directors of the Russell & Erwin Manufacturing Company, excepting that the understanding was that they were to continue to receive consignments of goods from the factories as before.

The fact of the conveyance of the real estate and factories, or any of the property, to Bruff, and of his making the declaration of trust, was unknown to the board of directors of the Russell & Erwin Manufacturing Company, or to any other of the officers of that

company, excepting Bruff himself, for more than a year after the date of the declaration of trust. Bruff states that it became known to them in February or March, 1874, and other witnesses state that it became known to them for the first time in May, 1874. The declaration of trust was not recorded.

There is no evidence in the case of any application by said Bruff for or refusal by the Russell & Erwin Manufacturing Company, or its board of directors or any of its officers, to furnish the steel necessary for carrying on the business of said trust as provided for by the declaration of trust. Bruff did, however, apply to the plaintiffs to furnish steel upon a credit of nine months and agreed to give them the indorsement of the Russell & Erwin Manufacturing Company upon the notes to be given for said steel, which notes were to be made by him on behalf of the Douglass Manufacturing Company. The complainants thereupon from time to time furnished steel to said works to the amount, in the aggregate, of about \$70,000. Notes were from time to time given therefor, and some of these notes, upon becoming due, were renewed.

At the time of the commencement of the action the plaintiffs' claim was represented by nine promissory notes, amounting to \$29,709.15, and an open account amounting to \$7,205.92. The notes were indorsed by Bruff in the name of the Russell & Erwin Manufacturing Company. There is no evidence in the case showing distinctly what portion of this steel was furnished within one year from the date of the trust deed and what portion was furnished after that time.

The fact of the indorsement of notes of the Douglass Manufacturing Company by Bruff in the name of the Russell & Erwin Manufacturing Company was not known to the board of directors or to the other officers of said latter company until the spring of 1874. The officers of the Russell & Erwin Manufacturing Company then for the first time also ascertained that payments from their funds to a large amount had been made by Mr. Bruff on account of the Douglass Manufacturing Company, so that a large debt from that Company to the Russell & Erwin Manufacturing Company had accumulated. As this had been done by Bruff without authority he was liable thereupon to the company. It was also found that Bruff was liable to the Russell and Erwin Manufacturing Company



upon certain matters outside of the Douglass Manufacturing Company transactions and not connected with this case.

The Russell & Erwin Manufacturing Company being thus aroused, at least partially, to a sense of their situation an examination was commenced, and Bruff, in order to bridge over the difficulty and assure the Russell & Erwin Manufacturing Company, made the conveyance to that company referred to in the complaint.

It recites that Bruff was indebted to the Russell & Erwin Manufacturing Company for moneys of that corporation advanced to the Douglass Manufacturing Company by him without authority while acting for certain purposes as the attorney of said corporation, and also on account of divers other acts and matters performed by him in connection with its affairs in excess of his authority or without authority, or without due care in the management of its business, and that he might thereafter become indebted to said corporation on account of said matters and other matters, and, also, that he had without authority, indorsed certain negotiable paper in the name of said corporation. The instrument then proceeds to transfer to said corporation 448 shares of the capital stock of the Russell & Erwin Manufacturing Company, and his right, title and interest in 400 other shares of such stock then held by the Middletown Savings Bank as collateral security for a loan, and also 210 shares in the Hudson River Iron Company. This stock the Russell & Erwin Manufacturing Company agreed to apply to the payment of said indebtedness and liability of said Bruff to them and to indemnify them against any loss or damages which might accrue to them by reason of the premises, matters and things aforesaid, and to pay over the balance to said Bruff.

Thomas Douglass also executed the instrument referred to in the complaint whereby he transferred to the Russell & Erwin Manufacturing Company all his interest in the property held by Bruff, as trustee, which the Russell & Erwin Manufacturing Company agreed to apply to the payment of the indebtedness of said Douglass, and of the said Douglass Manufacturing Company to the Russell & Erwin Manufacturing Company, then existing, or which might thereafter arise, and to the indemnification of the Russell & Erwin Manufacturing Company for any liability on their part, for or on account of said Douglass or said Douglass Manufacturing Company,

so far as the same should be sufficient, and to transfer any balance thereof, if any, to said Douglass.

The officers of the Russell & Erwin Manufacturing Company having now heard that the title to the factories and property of the Douglass Manufacturing Company actually stood in the name of their agent, R. P. Bruff, and having, by information received from Thomas Douglass, heard of the existence of some instrument of trust which had been executed by Bruff, prosecuted their inquiries still further and endeavored to ascertain its nature and contents.

Bruff presented to them, on the twentieth of May, a rough draft of an instrument which he said was substantially the same as the trust deed. The officers of the Russell & Erwin Manufacturing Company, not being satisfied with this, continued to press Bruff for the original declaration of trust or a copy of it. They did not, however, succeed in getting any thing further in answer to their inquiries until July 11, 1874, when, in answer to a letter written to Bruff by the assistant treasurer of the company, again demanding a copy of the declaration of trust, they received by mail from Bruff, who was then in Saratoga, a paper purporting to be a copy of the instrument.

This was not, however, a true copy of the trust deed, and the provision relating to the notes of Thomas Douglass for \$61,290.08, indorsed by Bruff in the name of the Russell & Erwin Manufacturing Company, was entirely omitted, and the corporation were up to this time ignorant of the existence of any such notes. They finally, however, about the 23d of July, 1874, succeeded in obtaining a copy of the declaration of trust. And now, having become aware of the large indebtedness of the Douglass Manufacturing Company to Thompson J. S. Flint, a conference ensued between them and Mr. Flint and Mr. Douglass upon the subject of the affairs of the Douglass Manufacturing Company, the condition of its property, and the fact that default had been made in the payment of certain notes mentioned in the declaration of trust.

It was found that the property was indebted to Mr. Flint in the sum of about \$113,000, and to the Russell & Erwin Manufacturing Company, for advances, etc., in the sum of about \$147,000, and that these sums could not probably be satisfied and paid by continuing the provisions of the trust deed, under Mr. Bruff, as trustee. Mr. Douglass also claimed that the property was indebted to him

in the sum of \$2,000 for money advanced, and Mr. Bruff claimed a similar indebtedness to him of \$16,000. It was therefore decided that the parties interested under the trust deed should call upon Bruff, as trustee, to transfer all the trust property in his hands to T. J. S. Flint and the Russell & Erwin Manufacturing Company for the consideration of the said debts due to them respectively. A written request to that effect was accordingly made to Bruff, and signed by the Russell & Erwin Manufacturing Company, T. J. S. Flint and Thomas Douglass. In compliance with this request Mr. Bruff transferred the trust property to Mr. Flint and the Russell & Erwin Manufacturing Company, by deed, dated July 24, 1874.

On July 28, 1874, a corporation by the name of the Douglass Manufacturing Company was formed, under the laws of the State of Connecticut, and was located at Seymour, Connecticut.

T. J. S. Flint and the Russell & Erwin Manufacturing Company, by their deed, dated July 31, 1874, conveyed to the newly-established corporation all the property, real and personal, which had been conveyed to them by Bruff, as trustee aforesaid.

The capital stock of the new corporation was fixed at \$280,000, which was subscribed for and taken by the defendants in proportion to their respective claims against the property. The plaintiffs, under the facts disclosed, claim to have a lien upon the trust estate for the amount of their debt; and judgment was rendered in their favor and for the amount of their demand. It appeared, in addition to these facts, that prior to the execution of the deed or assignment of July 24, 1874, the indebtedness arising from the execution of the trust was discussed, and it was understood and agreed that all legal or legitimate claims should be adjusted.

The evidence leading to this fact was objected to, it is true, and overruled. It is not important here, however, to pass upon the admissibility of that proof, although it is apparent that in an action like this it would not be declared objectionable, taken in connection with the whole scope of the issues, the nature of the claim, the defense and evidence given. But assuming that it was improperly received, it is quite clear that it could in no way prejudice the defendants in the result, because the obligation assumed by the acceptance of the trust estate was that it should be appropriated in the manner directed by the trust, and it passed, therefore, charged

with all matters justly affecting it. The authorities are numerous, if not uniform, to sustain the proposition that the purchase of the trust estate, with knowledge of the trust, imposes upon the purchaser the same duties in respect to the property which rested upon the trustee from whom he purchased. (Perry on Trusts, §§ 217, 328, and cases cited ; Tiffany & Ballard on Trusts, p. 197 and cases cited.)

The rule holds even when the purchase is for a valuable consideration, as the text of these writers, and cases cited, show. The defendants named, however, paid nothing for the property they received and accepted by the transfer. It was, ostensibly, to secure them against loss that the assignment was made. If the question were *res nova* the courts would so decide as matter of justice and equity, if there be any distinction between such terms.

The defendants mentioned knew of the trust ; they sought for and obtained a copy of the deed. The conduct of Bruff, the agent of the defendant the Russell & Erwin Manufacturing Company, has no relevancy to the issue, whether, under the circumstances, the defendants named are not bound to pay the plaintiff's claim. The first duty imposed by the trust was to pay the expenses of the business, and the steel supplied was the very basis of the business, and without which it could not proceed. The learned justice presiding at the trial, found that the estate was worth \$400,000 and upwards, including the goods manufactured and in process of manufacture, from the steel purchased, and the proceeds of such as had been sold out but not paid for ; and further, that the whole trust property was more than sufficient to pay the entire indebtedness created by Bruff in carrying on the business of the trust. There may be some conflict as to the value of the trust estate, but it is not serious, and does not demand any interference with the finding mentioned.

It thus appears that the assets which went into the hands of the Russell & Erwin Manufacturing Company and Flint, and were appropriated by them, were not only applicable to the plaintiffs' debt, but charged with it, and were sufficient to pay it. When these conclusions were reached, the personal liability of the defendants named was established, and the first issue was determined in favor of the plaintiffs, namely, whether, under the trust created and the subsequent events by which the defendants named succeeded to and

assumed it, they were liable for the plaintiffs' claim for steel sold and delivered and used in the business of the trust. None of the facts set forth in the statement made, which precedes this opinion, and which are most favorably stated for the defendants named, affects the view thus expressed; and none of the exceptions taken are such as to require a new trial on this branch of the inquiry, namely, as to the liability of the defendants named.

When this conclusion was arrived at, the next and remaining issue was, what amount was justly due to the plaintiffs for the steel furnished?

The defendants interposed, as a defense, that if the steel was furnished by the plaintiffs their claim was unreasonable and excessive in this, that the steel was defective and of bad quality and was not worth the amount claimed for it, and was of very little benefit, if any, in the manufacture of the goods. In regard to this defense, it appears that a motion was made for a reference, which was denied, because it was asserted that an important question of law was involved, and that unless under and by virtue of the construction given to the trust, referred to herein, a lien resulted in their favor, the plaintiffs could not succeed. It was conceded then that if the lien was declared to exist, a reference to take an account would become necessary, in order to dispose of the case. This proceeding is not referred to as affecting the plaintiffs' status, but incidentally. During the trial it was mentioned, and the attention of the justice presiding was called to it at an early stage.

The defendants' counsel subsequently objected to a question, because the subject of it did not arise on the hearing then proceeding. The learned justice said: "It is merely general;" and the counsel for the defendants then observed: "Your honor limits the effect of this testimony to its bearing on the trust and the rights on that paper;" and the answer was, "yes." This, it is apparent, related to the proposition, that in the case the issue then under consideration was as to the lien of the plaintiffs, or their right to recover without regard to the amount. Subsequently, and while the defendants' witness was on the stand, an answer was made to the question: "What is the quality of the goods?" and the plaintiffs' counsel objected to it so far as it concerned the quality of the steel. The learned justice then said: "I have ruled that the ques-

tion of the quality of the steel does not come up now," and proceeded to strike out a part of the answer bearing upon that subject. Again, the defendants' counsel asked the witness to state what the complaints were which were made of the goods manufactured of the plaintiffs' steel; and the question was objected to. The ruling was as follows: "The Court — So far as the value of the goods are concerned, to show the value of them, I will admit it; but so far as showing the character of the steel, that is a question to be determined hereafter. If the court determines that it is a question in the case, that goes to a reference; at present I exclude every thing going to the quality of the steel to reduce the price." And the defendants excepted.

When the decision of the learned justice was filed, in the opinion was found as follows: "The first question on the trial was the right to attack the value of the steel furnished, to reduce the amount due. It seems to me, in the absence of fraud, and none such appeared, the defendants are estopped from questioning the amount. The steel was regularly furnished on orders received by the trustee; when objected to returned; accounts regularly rendered, and notes given for them, and the steel used without objection."

This is in harmony with the ruling made, namely: "If the court determines that it is a question (referring to the character of the steel) in the case, that goes to a reference."

The proposition upon which the defense mentioned, and thus treated, was ultimately disposed of is now presented for consideration. Were the defendants estopped, by the circumstances, from assailing the quality of the steel, and claiming such a deduction on account of its bad quality, if established, as would be just? It was proved upon the trial, and not gainsaid, that the quality of the steel could not be ascertained without "working it up," as the witness said, and therefore the inspection and examination of it would not reveal its defects or imperfections. The implied warranty, that it was fit for the purpose for which it was sold, did not under such circumstances, impose upon the defendants or their predecessor the trustee, the duty of an immediate scrutiny of the steel and of giving notice of the defects discovered. They had a right to claim a deduction from the price when that was demanded. When the

contract of sale is executory the right of the purchaser to recover damages, on the ground that the article furnished does not correspond with the contract, will not survive an acceptance and retention of the property *after an opportunity to ascertain the defect*, without notifying the vendor. (*Reed v. Randall*, 29 N. Y., 363.) If, in the case of an executed contract, there can be an express warranty or undertaking accompanying the sale and delivery of the goods, that they are of a certain quality or condition, this agreement is obligatory upon the parties and is not merged in the act of delivery and acceptance. (*Muller v. Eno*, 14 N. Y., 597; *Waring v. Mason*, 18 Wend., 425; *Day et al. v. Pool et al.*, 52 N. Y., 416.) In either view, therefore, the defendants had the right to assail the claim of the plaintiffs in the manner indicated, and the learned justice was in error in excluding the defense thus presented.

The test of the steel involved its use, and it could not be rejected or returned. The circumstances detailed, such as the presentation of bills and settlement by notes, while they did not create an estoppel, were very important upon the issue, and would perhaps have been sufficient to demonstrate the want of good faith in making the defense interposed; but that does not meet the emergency. The defendants were entitled to their day in court on the subject, and could not be deprived of it. All that they can ask, however, is that there shall be a modification of the judgment, and that in regard to the amount due there shall be a reference, thus changing the judgment from an absolute to an interlocutory one. Their theory of the trial was, that if the lien were declared to exist, the amount to be paid would become the subject of another examination before a referee. The result is, that the judgment should be modified, as suggested; for which ample power is conferred by section 1317 of the Code of Civil Procedure.

We think the disposition made of the motion for a new trial was correct. The opinion of Justice LAWRENCE is an able exposition of the law of the application made to him, and satisfactorily demonstrates the propriety of denying the motion made.

DANIELS, J. :

The case of *Gurney v. Atlantic and Great Western Railroad Company* (58 N. Y., 358) seems to entitle the defendants to give

the evidence, which was rejected, concerning the quality of the steel. I concur.

DAVIS, P. J., concurred.

Judgment modified as directed in opinion, and order denying motion for new trial, on the ground of newly-discovered evidence, affirmed.

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J. G. SMITH, ARCHIBALD TAYLOR AND CHARLES R. SCRIBNER, PLAINTIFFS, v. ABRAHAM KRAUSKOPF AND JOSEPH A. GUNSEN, DEFENDANTS.

*Compromise under bankrupt act — contingent liabilities not discharged by.*

The defendants were indorsers of a promissory note held by the plaintiffs. After the giving of the note, but before its maturity, the defendants instituted proceedings under the bankrupt act to procure a discharge from their debts by a compromise proposed to, and accepted by the creditors. They set forth in the statement of their debts this note, and tendered to the plaintiffs the twenty-five per cent accepted by the other creditors, but the same was rejected. After defendants' discharge this action was brought upon the note.

*Held*, that their liability thereon was not affected by the proceedings in bankruptcy; that the compromise only released them from those debts or liabilities which had then become fixed and due, and not from debts on which they were only contingently liable.

CONTROVERSY submitted without action upon a general statement of facts.

Smith and Taylor, the plaintiffs, are the holders of a note for \$500 that matured February 29, 1876. Krauskopf and Gunsen, the defendants, are indorsers thereon, and this controversy is for the purpose of determining how much they are required to pay to satisfy and discharge their liability thereon. After the indorsement of the note and before its maturity, Krauskopf and Gunsen effected a compromise with their creditors, under the provisions of the bankrupt law, at twenty-five cents on the dollar. Those proceedings were terminated and the composition paid before the maturing of the note in question. The plaintiffs claim that the lia-



bility of the defendants upon this note was not affected by the composition proceedings, and that they are entitled to the full amount. The defendants insist that they are only required to pay \$125 in satisfaction of their liability, being twenty-five per cent of the amount of the note.

*Dunne, Adams & Carr*, for the plaintiffs. The liability of the indorsers upon this note could not become fixed so that it might be enforced by ordinary legal proceedings, until the maturing of the note and default of the maker. (*Musson v. Lake*, 4 How., 262; *In re Loder*, 4 N. B. R. R., 190.) Neither was the liability of the indorsers upon this note, before it matured and the maker made default, such, that it was provable against their estate in bankruptcy. (§§ 5067-5072, both inclusive, of U. S. Rev. Statutes; *In re Loder*, 4 N. B. R. R., 190; *In re Nicodemus*, 3 id., 230; *In re Crawford*, 5 id., 301.) Claims against an insolvent's estate under insolvent laws are, to some extent at least, analogous to those against a bankrupt's estate. Such a liability as is here the subject of consideration has been repeatedly held not provable under the insolvent law. (*Frost v. Carter*, 1 Johnson's Cases, 73; *Mechanics and Farmers' Bk. v. Capron*, 15 John., 467; *Stowell v. Richardson*, 3 Allen [Mass.], 64.) Neither is a claim of this character discharged by a discharge in bankruptcy when it is granted prior to the maturity of the note upon which the bankrupt is an indorser. (U. S. Rev. Stats., §§ 5117, 5118, 5119; *Pierce v. Wilcox*, 40 Ind., 70; *Robinson v. Pesant*, 53 N. Y., 419; *In re Gallison*, 5 N. B. R. R., 353; *In re Murdoch*, 3 id., 146; *Ogden v. Saunders*, 12 Wheat., 366.) Discharges granted under State insolvent laws are analogous to those in bankruptcy, and decisions with reference to the effect of such discharges, aid in the determination of this question. (*Frost v. Carter*, 1 Johnson's Cases, 73; *Mechanics and Farmers' Bk. v. Capron*, 15 Johns., 467; *Lansing v. Prendergast*, 9 id., 127; *Ford v. Andrews*, 9 Wend., 312; *Buel v. Gordon*, 6 Johns., 125; *The Rome Exch. Bk. v. Eames*, 1 Keyes, 588; § 4 Abb. Ct. App. Dec., 83, 92; *Berry v. McLean*, 11 Md., 92; *Paxson v. Harter*, 11 N. J. L. [Hals.], 410; *Stowell v. Richardson*, 3 Allen [Mass.], 64.)

*Melville H. Regensburger*, for the defendants.

BRADY, J.:

The question presented by this appeal and decisive of the plaintiffs' right to recover is whether the defendants could anticipate a contingent liability as indorsers; convert it into an existing debt or liability and secure a discharge from it by proceedings under the bankrupt law. (Section 5103, A. 22, June, 1874, § 17, known as a composition, proposed and accepted.) The defendants were indorsers of a promissory note, and before the note matured the proceedings were accomplished. They set forth the note in their statement of debts, and tendered the twenty-five per cent accepted to the plaintiffs in due time, but it was rejected.

The plaintiffs neither proved nor offered to prove any claim in bankruptcy against the defendants, and did not, so far as revealed, in any way participate in the proceedings mentioned. The defendants were not bound as indorsers until the failure of the maker to pay. They could waive notice of presentation and of non-payment and all other ceremonies which should be observed to make their contingent liability absolute, but the maker must fail to pay before their obligation matures. He is primarily liable, and if he pays, the indorsers are discharged, no matter what they have said or done in regard to the claim. It may be that the insolvency of the maker would have some effect upon the determination of the question discussed, but that fact does not appear, and we cannot assume it to have been the case. For aught that appears the assumption of the note by the defendants was entirely gratuitous, and took away from legitimate creditors whose debts were due some portion of the defendants' estate, which, being left, would have increased the sum to be paid in composition. There is no statement that the maker could not pay. Section 5069 contemplates the obstacle from contingent liabilities.

It provides as follows: "When the bankrupt is bound as drawer, indorser, surety or bail, or guarantor upon any bill, bond, note or any other specialty or contract, or for any debt of another person, but his liability does not become absolute until after the adjudication of bankruptcy, the creditor may prove the same after such liability becomes fixed and before the final dividend." The reason for this is apparent, and is what has been suggested, namely, the primary debtor may pay the debt, and thus absolve the surety,

guarantor or indorser. It is further provided (§ 5072) that no other debts than those specified in the five preceding sections shall be proved or allowed against the estate. The defendants' contingent liability was not one of the debts specified which could be proved or allowed against the estate, and could not be discharged by the composition for the same reason. It was not a debt or liability which had "become fixed" at the time the decree in favor of the defendants was rendered. The State insolvent laws being analogous to those in bankruptcy, may be invoked in determining whether such a liability would be discharged. Our statute provided that a discharge under the insolvent laws should be a bar to all debts of the insolvent, whether due or to become due, which existed at the time of the insolvent's assignment. Yet it was held that when the insolvent was indorser on a note not due when his petition was filed his discharge was no bar to an action on the indorsement after he had been properly charged as indorser, per WRIGHT, J. (*Rome Exch. Bk. v. Eames*, 1 Keyes, 597; see, also, *Mechanics and Farmers' Bk. v. Capron*, 17 Johns., 467; *Ford v. Andrews*, 9 Wendell, 312.) In illustration of this doctrine the section referred to declares only that the provisions of a composition accepted shall be binding on all the creditors whose names and addresses and the amounts of the debts due to whom are shown in the statement of the debtor produced, etc. The contingent debt of the defendants incurred by the indorsement had not become due from the defendants. The note had not matured when the proceeding was consummated.

It may be that the defendants, by analogy to the mode in which bankrupts are relieved as to contingent obligations (§ 5069, *supra*) could apply upon the maturity of their indorsement to have it included in the composition in accordance with the provision made for it by the resolution of the creditors, but of that it is not necessary for this court to declare its views. Without, however, pursuing the subject further, it is quite clear that the plaintiffs are entitled to judgment.

DAVIS, P. J., and DANIELS, J., concurred.

Ordered accordingly.

MARGARET C. WHEELER, INDIVIDUALLY AND AS EXECUTRIX,  
ETC., APPELLANT, v. JAMES H. RUTHVEN, EXECUTOR, ETC.,  
AND OTHERS, RESPONDENTS.

*Legacy—when payable.*

Where a legacy is payable out of a particular fund which is not available for that purpose until a certain contingency happens, *e. g.*, the death of a tenant for life, such legacy will, in the absence of special circumstances or of a provision of the will prescribing a different time of payment, be payable at, and will bear interest from the happening of the contingency, and not from the death of the testator.

APPEAL from a decree of the surrogate of New York in the matter of the final accounting of the respondent.

Clementina Ruthven died October 28, 1862, leaving a will dated August 20, 1862. Letters testamentary were granted to J. J. Owen, June 15, 1866. Owen died April 18, 1869, and letters testamentary were thereafter granted to James A. Ruthven, another executor, May 15, 1874.

By her will she bequeathed to Emma Ruthven Lord (now Ludlum) the sum of \$5,000, and made various other bequests of specific sums, amounting in all to twenty-one specific bequests of sums of money.

The only estate which the said Clementina Ruthven had to be disposed of by will was real and personal property devised to her by her father prior to the date of her will, subject, however, to a life estate in the whole to the mother of said Clementina who survived her and died April 7, 1874. The accounts of James A. Ruthven were filed, and no objections made to the same, showing assets in his hands, of personal property, of \$38,358.67, received after the death of the tenant for life, and some real estate.

The decree of the surrogate on said accounts was made May 18, 1877, by which the said accounts were settled and allowed, as filed and adjusted, and interest on the several legacies at the rate of seven per centum per annum allowed only from the 7th day of April, 1874, the date of the death of the life tenant.

The appellants object to so much of the decree as allows interest from April 7, 1874, and claim that interest should be allowed from

October 28, 1863, viz., from and after the expiration of one year after the death of the testatrix.

*J. Edgar*, for the appellant. Interest on each legacy should commence to run at the time it became due and payable, viz., at and from the expiration of one year from the death of the testatrix. (*Williamson v. Williamson*, 6 Paige, 300; *Dayton on Surrogates*, 465; *Williams on Executors* [5th ed.], 1284, 1285, 1286; *Willard on Executors*, 355, 390; 2 *Roper on Legacies*, 1251; *Hepburn v. Hepburn*, 2 Brad., 74; *Lawrence v. Imbree*, 3 id., 364; *Bradner v. Faulkner*, 12 N. Y., 472; *Campbell v. Cowdrey*, 31 How., 172.)

*Wm. Vennill* and *Chas. E. Souther*, for the respondents.

BRADY, J. :

In this matter the decree of the surrogate is well sustained by the able opinion which accompanies it. As shown by him the rule is recognized and repeated in the cases cited, that interest upon a legacy will not be allowed, unless special circumstances or the provisions of the will require it to be done, until it is payable. The legacies given by the testatrix were subordinate to her estate, which consisted solely of a residuary interest in certain property left her by her father and in which her mother had a life interest. Up to the time of the death of the mother, therefore, no assets came to the hands of the executor out of which the legacies could be paid. The time for the payment of them until such death could not arrive, and the presumption that one year after the death of the testatrix was sufficient to enable the executor to gather in the assets and to make payment consequently falls to the ground. The assets were then appropriated to another purpose and so were the rents, issues and profits of them, and they continued to be so after the death of the testatrix, because they were subjected to the life estate of the mother who survived her daughter.

It must be presumed that the testatrix was aware that they would not be available for the payment of the legacies given, until the death of her mother, and that she intended, therefore, to defer such payment until the fund existed for that purpose. (See *Dodge v. Manning*, 1 Coms. Rep., 298.)

She designed, in other words, that the gift should follow the estate out of which it was to be paid, and that it should be available in no respect until such estate could be applied to its payment. This is a just view of the subject, springing from her silence as to the time when the legacies should be paid, taken in connection with the nature of the property out of which they were to be satisfied. When the fund is not available for the payment of the legacy until a contingency happens, there seems to be no reason why it should bear interest from the death of the testator before the happening of the contingency, in the absence of special circumstances requiring it to be done, or a provision in the will indicating an intention that it should be paid for a different period.

If the interest be given in this case from a time one year after the death of the testatrix, and therefore prior to the acquisition of the assets by her executor, the fund would be weighted with a burden for years before it could be applied to the objects named in the will.

For these reasons and the reasons assigned by him the decree of the surrogate should be sustained.

DAVIS, P. J., and INGALLS, J., concurred.

Decree affirmed.

M E M O R A N D A  
OF  
CASES NOT REPORTED IN FULL

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THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*  
JOHN MURRAY *v.* THE JUSTICES OF THE COURT  
OF SPECIAL SESSIONS OF THE PEACE IN AND FOR  
THE CITY AND COUNTY OF NEW YORK.

*Court of Special Sessions — jurisdiction of — trial by jury in.*

CERTIORARI to the Court of Special Sessions to review a conviction of the relator.

The return showed that the relator was arrested upon a complaint made in due form, before one of the police justices of the city, upon a charge of assault and battery, and that on being brought before such magistrate, he elected to be tried for such alleged offense by the Court of Special Sessions of the Peace, and was committed to await such trial, and required to find bail, in the sum of \$500, for his appearance at the Court of Special Sessions, to answer to the complaint preferred against him for said offense.

Subsequently, but in what manner it does not appear, he was brought before Mr. Justice DONOHUE, of the Supreme Court, and there entered into a bond or recognizance for his appearance at the next term of the Special Sessions. The recognizance recited the above facts. The complaint and papers were then transmitted to the clerk of the Court of Special Sessions, for trial at said court. Afterwards, and on the 25th of September, 1877, the Court of Special Sessions was duly organized at the halls of justice, in the city, and the relator was brought before the court for trial upon said complaint. The complaint was read to him, and he was called upon to plead thereto, and thereupon he pleaded not guilty. Such plea was duly entered in the minutes of the court. The court thereupon

then proceeded to try the issue, and witnesses were produced by the complainant and the relator; and upon such trial the relator was found guilty and sentenced to imprisonment for the term of four months.

The court, at General Term, said: "The only questions raised here relate to the jurisdiction of the Court of Special Sessions. By section 5 of chapter 337 of the Laws of 1855 (which may be found cited in third Revised Statutes [Banks' 6th ed.], 242), jurisdiction is given to the Court of Special Sessions over all complaints for misdemeanors, made before police justices, unless the court shall send the case to the General Sessions, or unless the accused, when brought before the committing magistrate, shall elect to have his case tried in the General Sessions.

The relator, in this case, elected to be tried at the Special Sessions, and he entered into a recognizance reciting such election and conditioned for his appearance before such Court of Special Sessions. On his appearing for trial he made no objection that the case was not properly before the court, and no claim that it should be sent to the General Sessions, but entered the plea of not guilty, and submitted himself to trial before that court, as though all preliminary steps had been in all respects regular and proper. It is too late for him to object to any want of formality in any proceeding antecedent to his trial, for all matters of form must be deemed to be waived by his appearing before the Court of Special Sessions, joining issue and proceeding to trial, without the suggestion of any objection to the regularity of any proceeding or the jurisdiction of the court.

The Court of Sessions existed prior to the first Constitution of the State, which was adopted in 1777. It was first created by the Colonial legislature in 1744, and has ever since, with various changes and modifications made by the legislature, existed in this State.

Trial by jury was wholly unknown in that court until it was created *sub modo*, by the act of 1824. The common-law jury however, has never existed in that tribunal. (*In the Matter of Sweatman*, 1 Cow., 144, 151, note *e*; *Murphy v. People*, 2 id., 815, 818, note *b*; *People v. Riley*, 5 Parker Crim., 401; *People ex rel. Walker v. Special Sessions*, 4 Hun, 442.)



We do not think that there is any force in the position urged by the learned counsel for the relator, that the relator was entitled to a trial by jury, because he had given bail for his appearance before the Court of Special Sessions. Undoubtedly that right would have existed if he had entered into a recognizance for his appearance at the General Sessions, and had appeared in person, pursuant to such recognizance, for trial at the General Sessions. It is clear, in such case, that his right to trial by common-law jury would have been complete and could not have been waived even by himself. (*Cannemi v. The People*, 18 N. Y., 128; *Cruger v. Hudson River R. R. Co.*, 2 Kern., 198; *People v. Kennedy*, 2 Parker, 312.)

If the recognizance, or bond, given for his appearance at the Special Sessions were altogether irregular or extra judicial, it nevertheless could not have the effect to transfer the case, which, by the election of the relator, was to be tried in the Court of Special Sessions, to another tribunal. But if it were regularly and properly taken, the appearance of the relator before the Sessions was in accordance with its exigency and requirement, and therefore it cannot be held to have taken away the jurisdiction of that court.

Under the statutes creating the Court of Special Sessions of this State, trials are had before three police justices without a jury. No provision is made either for the common-law jury or the statutory jury provided for Courts of Special Sessions in other counties of the State. We are unable to see any error in the proceedings or any want of jurisdiction in the court.

The writ should be dismissed and the proceedings of the Special Sessions affirmed."

*Wm. F. Kintzing*, for the relator. *B. K. Phelps*, for the respondent.

Opinion by DAVIS, P. J.; BRADY and INGALLS, JJ., concurred.

Writ dismissed, proceedings affirmed.

DEVELIA L. BRADBURY, APPELLANT, v. JAMES WINTER-  
BOTTOM, RESPONDENT.

*Severance of causes of action—offer to allow judgment to be taken for one of several claims—effect of, on right to sever.*

APPEAL from an order denying plaintiff's motion to sever the action in reference to the claims alleged therein.

The plaintiff alleged two causes of action separately. The defendant denied by answer his liability upon the second cause of action, and served an offer to permit judgment to be taken against him for the amount claimed under the first cause of action. The answer interposed admitted the demand to which the offer related, by failing to refer to it in any way.

The court at General Term said: "The offer was made under section 758 of the Code of Civil Procedure, and within the ten days allowed for its acceptance the plaintiff served notice of a motion for liberty to sever the action and for judgment for the first cause of action admitted, as suggested by the answer, and further that the action continue as to the second claim set out in the complaint. This proceeding was under section 511 of the Code, which provides that where a part of the plaintiff's claim which may be severed from the remainder is admitted upon the pleadings, the court, upon the plaintiff's motion, may, in its discretion, order that the action be severed; that a judgment be entered for the plaintiff for the part admitted, and if the plaintiff so elect, that the action be continued with like effect as to the subsequent proceedings, as if it had been originally brought for the remainder of the claim. The application thus made was denied, and the plaintiff appealed. The denial must have resulted from a misapprehension of the effect of granting the relief sought, occasioned by the offer which it was doubtless supposed must be retained to prevent the plaintiff from recovering costs, and to secure them to the defendant if successful in resisting the second cause of action.

This was an erroneous view of the issue presented. When a severance is made, if an offer covering the separate claim has been accepted, the costs allowed in granting judgment for the sum would

be to the time of such acceptance, and if no acceptance were given, then to the time of the motion granted. If the plaintiff, proceeding as to the severed claim, did not succeed, the defendant would be entitled to costs, because as to it the action proceeds as if it had been brought only to recover such claim, and the offer would not give the defendant more protection from, or right to costs than the statute confers. The offer, therefore, in such a case accomplishes nothing. If the granting of such a motion as that considered occasioned no prejudice to the defendant, it should not have been refused. It was right under provisions of the Code that the application should be favorably received, because the claim was distinct and as such admitted to be due. The offer doubtless, as already suggested, created the doubt which led to the denial of the motion, but that paper duly considered furnished no reason why the motion should not have been granted, as indicated herein."

The order appealed from should, for these reasons, be reversed, and the motion granted; but, as the question is novel, without costs to either party.

*Moody B. Smith*, for the appellant. *George Stevenson*, for the respondent.

Opinion by BRADY, J.; DAVIS, P. J., and INGALLS, J., concurred.

Order reversed and motion granted, without costs to either party.

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JOHN H. HARDT AND OTHERS, APPELLANTS, v. HERMAN  
SCHULTING, RESPONDENT.

*Evidence — Intent — False representations — when questions as to, material.*

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

This action was brought to set aside a release given by the plaintiff to the defendant on the ground that the same was procured by false and fraudulent representations made by the defendant. The case is in all respects similar to that of *Dambman v. Schulting* (12 Hun, 1). Upon the trial the following questions were asked by the plaintiff of the witness, Frederick A. Von Bernuth: "Did you sign that release in consequence of representations made in

August?" "Did he at the time you signed this release say any thing to vary his previous statements as to his property?" They were objected to by the defendant's counsel and excluded by the court, and the plaintiff excepted to the ruling.

The court at General Term said: "We think the learned justice erred in not allowing the witness to answer the questions. The questions did not call for a bare opinion of the witness or a mere mental operation. They called for a fact material to the issue upon trial. It has been repeatedly held that in a proper case the intention which prompted an act or the belief entertained in regard to the truth of a statement upon which a witness acted, may be proved by asking the direct question without resorting to conversations or circumstances. (*Thorn v. Helmer*, 2 Keyes, 27, 30; *Berrian v. Sanford*, 1 Hun, 626; *Caspar v. O'Brien*, 15 Abb. [N. S.], 402; *Raynor v. Page*, 2 Hun, 652; *Thurston v. Cornell*, 38 N. Y., 281; *McKown v. Hunter*, 30 id., 625."

*W. Watson*, for the appellants. *C. B. Smith*, for the respondent.

Opinion by INGALLS, J.; DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed and new trial ordered, costs to abide event.

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JOHN SCHELLY, RESPONDENT, v. PETER ZINK AND OTHERS,  
APPELLANTS.

*Order of arrest—neglect of party procuring, to enter judgment when it is in his power so to do—Code, § 288—discharge by order under—vacating said order—effect of.*

APPEAL from an order of the Special Term denying the motion of the appellant for discharge from imprisonment under execution.

The appellant was arrested on an order of arrest, and not giving bail remained in actual custody under the order. He appeared in the action by attorney upon whom the complaint was served. No answer was served to the complaint, and the appellant claiming that the plaintiff had neglected to enter judgment in the action after it was in his power so to do, moved, under the provisions of section 288 of the Code, for an order discharging him from custody. He obtained an order upon affidavits to show cause why he should not

be discharged from custody. The order was returnable on the 12th of July, 1875, at ten and a-half A. M. On that day it was adjourned to the sixteenth of July, and on the sixteenth of July it was further adjourned to July nineteenth at ten and a-half A. M. At the adjourned hour, on the nineteenth of July, the appellant's attorney appeared, and no one appearing to oppose took an order by default for the discharge of the appellant from custody. The attorney for the respondent appeared at eleven A. M., supposing that that was the hour to which the motion stood adjourned, and upon learning that his default had been taken called the attention of the court to the fact of his impression as to the hour of adjournment. The court, thereupon, directed that no order be entered, until the plaintiff's attorney saw the attorney for the appellant, in order that an hour might be fixed to have the motion argued. Plaintiff's attorney immediately applied to the attorney of the appellant, who consented that the proceedings stand adjourned to the following day at ten o'clock A. M., and indorsed his consent, subscribing the same on the papers. Before doing this, however, the order by default had been entered and the appellant had been discharged from the custody of the sheriff. On the twentieth the attorneys for the respective parties appeared at the Special Term and the motion was argued, and an order was made on that day vacating and setting aside the order by default, entered on the nineteenth of July, and remanding the appellant to the custody of the sheriff upon the order of arrest and denying the relief asked for by the motion for discharge, on condition the plaintiff enter judgment in three days against the appellant, otherwise the motion was granted. Judgment having been entered as required by this order, upon which an execution against the property had been returned unsatisfied, an execution was issued against the body of the appellant on which he was arrested and held in custody by the sheriff, and this motion is for the discharge of the appellant from imprisonment on the execution so issued. No appeal was taken from the order of July twentieth.

The court at General Term said: "The only question is whether the order taken by default on the nineteenth, and upon which the appellant was actually discharged, was such a *supersedeas* of the arrest and of the order upon which it was made that it could not be restored by the court, as was sought to be done, by vacating the order

of default and hearing and disposing of the motion on its merits. Section 288 of the Code, after providing for the application for discharge, concludes with these words, 'and after being so discharged such defendant shall not be arrested upon any execution issued in such action.'

A very ingenious argument was made by the learned counsel for the appellant, based upon this provision of the Code and upon the fact that the appellant had been actually discharged under the order of the nineteenth, to the effect that the order of discharge having been executed the same could not be opened or vacated so as to restore the parties to their former condition, and that the attorney of the appellant had no authority to consent to open the same for such purpose. We are of the opinion, however, that the circumstances of this case do not bring it within the authorities or the principle cited and relied upon by him.

The attorney's power was not exhausted, even had his retainer been special, for the motion had not been heard upon its merits and it was within his authority to open the default and allow the motion to be heard on its merits. His indorsement of an adjournment of the motion to the twentieth, made on the nineteenth, and immediately after the order had been entered, was equivalent to a stipulation to waive the default and allow the motion to be heard on the merits, and that the order already entered by default depend upon the result of that motion. This is practically what was done; and when the parties appeared on the following day and argued the motion the court had jurisdiction to ratify the order by default and all that had been done under it, or to vacate that order absolutely and dispose of the motion upon its merits. The latter course was taken and we think it was effectual, and if not appealed from final.

We are, therefore, of opinion that the appellant was properly arrested on the execution, and that the order of the court below denying the motion for his discharge should be affirmed, with ten dollars costs and disbursements."

*Ira Shafer*, for the appellant. *A. J. Vanderpoel*, for the respondent.

Opinion by DAVIS, P. J; BRADY, J., concurred. INGALLS, J., not sitting.

Order affirmed, with ten dollars costs, and disbursements.

THERESA HOFFMAN, APPELLANT, v. WILLIAM C. CONNER,  
LATE SHERIFF, ETC., RESPONDENT.*Sheriff—neglect to enforce execution in replevin suit.*

APPEAL by the plaintiff from a judgment entered after a trial at the Circuit, at which the complaint was dismissed; also from an order denying a new trial, upon a motion therefor, made upon the minutes of the court.

Charles Hoffman instituted an action in the Marine Court against the appellant to recover the possession of certain personal property, and at the commencement of such action, by a proceeding under that portion of the Code, entitled "claim and delivery of personal property," took possession of such property and retained the same. The appellant prevailed in the action in the Marine Court and a judgment was entered therein awarding to her a return of the property or the value thereof if return could not be made. An execution was issued to the respondent, as sheriff, in accordance with the judgment, which he returned October 28, 1876, with the following certificate indorsed thereon: "I certify and return to the within execution that I cannot find the personal property within described within my county so as to deliver the possession of, and return same to the defendant by this, as within I am commanded; and I further certify that I cannot find any personal or real property of the plaintiff within my county, out of which I could make the amount of the value, damages and costs within mentioned or any part thereof."

During the time the sheriff held the execution he was informed where the property was, and an offer was made to point it out to him at the house of one Miller in the city of New York. No reasonable doubt existed as to the identity of the property, which was a quantity of furniture.

The sheriff did not visit Miller's house or make any effort whatever to seize the property and deliver it to the plaintiff.

The court at General Term said: "We are unable to arrive at any other conclusion than that the sheriff wholly neglected his duty in regard to the execution of the process. The pretense that the furniture was in Miller's possession was wholly insufficient to

shield the officer from liability. He should have ascertained by what claim Miller held such possession; whether he had any title superior to the plaintiff; whether any opposition or resistance would be interposed by Miller to the execution of the process.

When a party places in the hands of an officer a process he has a right to expect and require a vigilant and faithful execution thereof. It is for such purpose the office is created, and the incumbent accepts the position charged with the responsibilities involved, and should not be allowed to neglect or evade the performance of duty to the prejudice of a party interested.

The evidence wholly fails to establish a state of facts which justify the sheriff in neglecting or refusing to make delivery of the property in question to the plaintiff. The return shows that nothing could be collected of Hoffman. Consequently by the neglect of the sheriff to deliver the property to the plaintiff she will in all probability be subjected to the loss of the same, with all the expenses attending the controversy. There was certainly evidence of the value of the furniture sufficient to submit to the jury. The inquiry taken by the sheriff in the same proceeding was put in evidence wherein the property was appraised, which furnished some evidence of value as against him. Again, the execution contained a statement of the value of the property, and that was in evidence. We cannot doubt but that there was evidence sufficient upon that question to submit to the jury. (*Ledyard v. Jones*, 7 N. Y., 550; *Swezey v. Lott*, 21 id., 484; *Bowman v. Cornell*, 39 Barb., 69.)

*Edward P. Wilder*, for the appellant. *A. J. Vanderpoel*, for the respondent.

Opinion by INGALLS, J ; DAVIS, P. J., and BRADY, J., concurred.

Judgment reversed and new trial ordered, costs to abide event.



**Cases**  
DETERMINED IN THE  
**FOURTH DEPARTMENT**  
AT  
GENERAL TERM,  
April, 1878.

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WILLIAM F. EDINGTON AND ABRAM SLEEPER, RESPOND-  
ENTS. v. THE ÆTNA LIFE INSURANCE COMPANY,  
APPELLANT.

*Policy of insurance — assignment of — declarations of assignor — not admissible against assignee — Physicians cannot disclose facts acquired while attending patients — waiver of this point — right of assignee so to do — Words — submission of meaning of to jury — Application to company — what constitutes — Discrepancies in answer — when immaterial.*

The defendant issued a policy of insurance upon the life of one D., payable to the assured, his executors, administrators or assigns. D. transferred his interest in the policy to plaintiff for the sum of \$1,000, reserving the right to redeem, on repaying said sum with interest in one year, and, during his life, but in case of his death before redeeming, the transfer to be absolute. In an action by plaintiff to recover the amount of the policy, after D.'s death, it was claimed by the defendant that the agreement was against public policy, and fraudulent as to the heirs and next of kin of the assured, as it tended to deprive them of the right to redeem. *Held*, that the agreement was valid, and should be sustained.

*Semble*, that in an action by the assignee of a policy of insurance, issued upon the life of his assignor, to recover the amount thereof, declarations made by the assignor are not admissible in evidence against the plaintiff, whether made before or after the issuing of the policy.

In no event can declarations made after the issuing of the policy be admitted. Upon the trial, Dr. E., who had testified that he had treated D. and prescribed for him in the spring and summer of 1862, was asked, "What did you do by way of treatment to him?" "Was he cured when he left your hands?" "Was

he better or worse after you ceased treating him?" *Held*, that the court properly refused to allow the questions to be answered, as they were forbidden by the statute (2 R. S., 406, § 73) prohibiting a physician from disclosing information acquired by him in attending a patient professionally.

He was then asked whether, in May, 1867, in his opinion, "D. was in good health, and of sound body, and one who usually enjoyed good health?" *Held*, that the question was objectionable, as the opinion of the witness must necessarily be based, in part at least, on the information acquired by him in his professional attendance on D.

A physician was called who testified that he had examined D. for insurance in the Phoenix Life Insurance Company about the time of the second application in this case, and passed him as insurable. Upon cross-examination, he was asked if he would have recommended D. for insurance if the latter had informed witness that he had been treated by any of the five physicians who had attended him for a disease which he was unwilling to disclose, or that he had been under treatment for five years. *Held*, that the opinion of the witness as to what he would have done had those statements been made to him was of no importance, and was properly rejected.

The prohibition imposed by the statute upon a physician, preventing him from disclosing information acquired by him in attending upon a patient professionally, is for the benefit of the patient, and may be waived by him or by his assignee, nor is this privilege of the assignee affected by the death of his assignor.

To the question in the application, "Is the party subject to dyspepsia, dysentery or diarrhoea?" D. answered "No." Upon the trial the court charged the jury: "You will say what is the fair meaning of the words 'subject to.' Does it mean a single occurrence of a disease — a single attack — or does it mean that one has been habitually attacked, or that he is under the possession of the disease? \* \* \* Looking at this question, it is for you to say whether he was subject to dyspepsia, dysentery or diarrhoea." *Held*, that, as submitted, there was no error in allowing the jury to determine the meaning of the words "subject to."

To the question in the application, "Has any application been made to this or any other company for assurance on the life of the party; if so, with what result?" D. answered, "Yes, and always successful." It appeared that, in 1862 or 1863, he handed to the agent of a foreign insurance company an application for insurance; that the agent said he did not think the company would take him; that, upon D.'s request, he handed the application to the examiner for the company, who was then D.'s physician; that the agent subsequently told D. that the examiner said he could not pass him, and that the examination was a farce and an unnecessary expense to put the company to; and there the matter dropped. The court left it for the jury to say whether or not D.'s answer was a truthful one. *Held*, that it did not appear that an application was made to the company; that the application was not even made to the agent to be forwarded to the company; that the application was never completed.

One question was: "Has the party had, during the last seven years, any severe sickness or disease; if so, state the particulars and the names of the attending

physicians, or who was consulted and prescribed?" The answer in the first application was: "Has had nervous difficulty and diarrhoea; C. H. Carpenter, Geneva, N. Y.;" in the second it was "No." The court left it to the jury to determine whether or not the nervous difficulty or diarrhoea was, in fact, a severe sickness or disease. *Held*, that this was proper; that if the nervousness and diarrhoea were not, in fact, severe diseases; the discrepancy between the two answers was not material.

The question who is an attending physician under 2 Revised Statutes (406, § 78), discussed.

**APPEAL** from an order denying a motion for a new trial made upon the minutes of the judge, after verdict rendered in favor of the plaintiffs at the Ontario Circuit.

This action was brought to recover the amount of two policies of insurance for \$7,000, issued by the defendant on the life of William F. Diefendorf, of Geneva, New York, title to which was claimed by the plaintiffs by virtue of an assignment bearing date October, 18, 1870. The policies were payable to the said assured, his executors, administrators or assigns, within ninety days after due notice and proof of the death of the said W. F. Diefendorf, or if the said W. F. Diefendorf should survive twenty-five years, then the amount insured was to be paid to him; and, in either case, all indebtedness of the party to the company should be deducted from the sum insured.

The answer of the defendant alleged that when the policies were obtained by Diefendorf, the assured, he made certain false representations and warranties, and concealed certain material facts in reference to his then, and previous health and physical condition, and in reference to other material matters, about which he was asked in certain questions then propounded to him.

The assignment under which the plaintiffs claimed expressed a consideration of \$1,000, and provided that Diefendorf, the assured, might redeem the policies at any time during one year; and also provided that, in case Diefendorf should die within the year, the assignment should become absolute. The first policy bore date June 18, 1867, and insured Diefendorf's life in the sum of \$2,000. The second policy was dated May 29, 1868, and the application on which it was issued was dated May 13, 1868.

In the course of the charge, the court said: "It is claimed, also, that in answer to question No. 13, in that application, he answered

untruly. That question is: 'Is the party subject to dyspepsia, dysentery or diarrhoea?' To this question he answered 'No.' That will lead you to inquire what is meant by the term 'subject to.' Upon this subject, let me say that the words used in these questions are to be understood as men generally would understand them in common use. The usual meaning of the terms is to be given to them. You are to understand them as usually employed and understood. You will say, what is the fair meaning of the words 'subject to?' Does it mean a single occurrence of a disease — a single attack — or does it mean that one has been habitually attacked, that he is under the possession of the disease? You say a man is subject to a cough, does it mean that he has had it once or twice, or does it mean that it has taken possession of him substantially? Looking at this question, it is for you to say whether he was subject to dyspepsia, dysentery or diarrhoea. If you shall find that he was not subject to either of these diseases, then that question was answered truly, and the defense to it is not established; but if you find that he was subject to one or more of the diseases therein named at the time he made the answer, the defense is established upon that ground."

*E. G. Lapham*, for the appellant.

*G. F. Danforth*, for the respondents.

SMITH, J.:

The counsel for the appellant contends that the assignment of the policies is void. By the terms of the assignment, Diefendorf transferred to the plaintiffs his interest in the policies in consideration of the sum of \$1,000, he reserving the right to redeem the same on repaying the said sum with interest, in one year and during his life, but in case of his death before redeeming, the transfer to be absolute. It is claimed that the provision rendering the assignment absolute in case the assured should die without redeeming, is against public policy, and is also fraudulent as against the heirs of the assured, and is designed to deprive them of the right to redeem. It is difficult to discover any reason for holding that the assignment is not valid and operative according to its terms. The policies,

by their terms, were assignable at the pleasure of the insured; they imposed no limitation upon the power of assignment; they vested no right or preference in the legal representatives or heirs of the assured; and in the terms and purpose of the assignment itself there is nothing unlawful. We think that the assignment was good in law, and the assignor having died within the year without redeeming, that the title to the policies, and the right to recover the moneys due upon them vested absolutely in the plaintiffs.

Numerous questions are presented by exceptions taken by the defendant's counsel to rulings of the trial court upon the admissibility of certain items of testimony. They will be briefly considered, so far as is necessary.

1. The case states that the defendant's counsel offered in evidence the deposition of George Proudfit, taken in Michigan, under a commission; that the counsel for the plaintiffs objected to a part of the deposition, described in the case as that part of the answer to the fifth interrogatory which purported to relate to the declarations or statements of Diefendorf, and that it was excluded. The case does not set forth the portion of the deposition which was excluded, but its substance is perhaps to be inferred from an offer made by the defendant's counsel immediately after its exclusion, "to prove from the testimony of Proudfit, in connection with the fact that Diefendorf was in feeble health and debilitated, and confined to his bed upon one or two occasions during the years 1866, 1867 and 1868, declarations made by him to the witness, explaining his sickness or physical condition." To a question put by the court when the offer was made, the counsel replied that he simply meant to offer to read the whole of the answer to the interrogatory, and the offer was excluded. Assuming that the excluded part of the answer was to the effect stated in the offer above transcribed from the case, we think it was properly shut out as mere hearsay. The declarations of Diefendorf were not admissible against the plaintiffs, who, although deriving their title from him, were not identified with him in interest, they being purchasers for value. (*Paige v. Cagwin*, 7 Hill, 361.) It is immaterial that the policies were not negotiable. (*Id.*; *Booth v. Swezey*, 4 Seld., 276.) And the fact that the party making the declarations is since deceased, makes no difference. (*Stark v. Boswell*, 6 Hill, 405; *Tousley v. Barry*, 16 N. Y., 497.)

In general, to make the declarations of a person not a party to the suit, competent evidence, there must be an identity of interest between such person and the party against whom the declarations are offered. But there is no such identity of interest between parties occupying the relation of vendor and purchaser. Were this suit brought by the next of kin or the legal representatives of Diefendorf, the case would be different. It is urged, however, by the appellant's counsel that in the circumstances stated in the offer, the declarations being explanatory of the speaker's bodily ailments, were admissible as *res gestæ*. Upon this point we are referred to the case of *Swift v. Massachusetts Mutual Life Insurance Company* (63 N. Y., 186). That case is clearly distinguishable from the present. There, the plaintiff had taken the policy sued on to herself, on the life of her husband, for her own benefit. The decision in that case seems to proceed upon the ground that the legal relation between the policyholder and the insured, was such that the declarations of the latter, within certain limitations, were admissible to show his knowledge of his state of health. The limitations laid down by the court were that only those declarations were admissible which were made prior to the examination of the insured by the agent of the insurer, at a time not too remote from such examination, and in connection with facts or acts exhibiting his state of health. The learned judge who wrote the opinion was careful to state, in accordance with numerous prior decisions, that declarations of the insured made after the contract of insurance had been effected, are not admissible in evidence, for the reason that after the contract of insurance has been effected the subject of insurance has no such relation to the holder of the policy as gives him power to destroy or affect it by unsworn statements. And this suggests another point of difference between *Swift's* case and the one in hand. There the declarations which were held admissible were made before the contract of insurance was effected; here, for aught that appears in the offer, the declarations were made after both policies in suit were issued. The last policy was dated May 13, 1868, and the declarations would have been within the offer, if made in the subsequent part of the year. The offer was properly excluded. The same considerations apply to the offer to read the answer of the same witness to the sixth interrogatory.

2. The several objections taken to questions put by the defendant's counsel to the witness, Dr. Eastman, who had been the attending physician of Diefendorf, were properly sustained. The statute which prohibits a physician from disclosing information acquired by him in attending a patient professionally (2 R. S., 406, § 73), prevents not only a direct disclosure by him, as a witness, of the prohibited information, but also the giving of any answer which tends in any degree, however remote or indirect, to throw light upon the subject of the prohibition. Upon that subject he is not to furnish any information, however slight. Dr. Eastman testified that he treated Diefendorf and prescribed for him in the spring and summer of 1862. The questions — "What did you do by way of treatment to him?" "Was he cured when he left your hands?" "Was he better or worse after you ceased treating him?" — were obviously within the prohibition of the statute. If answered, they opened the door to an inquiry as to the maladies for which he was treated, and as to his condition while he was in the witness' hands. He was asked whether, in May, 1867, in his opinion, "Diefendorf was in good health and of sound body, and one who usually enjoyed good health." That question was objectionable, for the reason that whatever opinion the witness had on the subject was necessarily based, in part at least, on the information acquired by him in his professional attendance on Diefendorf. The objection was not obviated by the succeeding question, which called for the witness' opinion on the same subject, excluding, in terms, any knowledge or information that he obtained while treating Diefendorf. (See *Edington v. M. Life Ins. Co.*, 67 N. Y., 185.) It was impossible for the witness to exclude such information from his mind in forming an opinion, and if it were possible, the opinion would have been based upon partial information, and would have been of no value as evidence. It by no means follows from these views, as appellant's counsel suggests, that a physician who has once attended a patient is forever prohibited from giving a medical opinion as to the subsequent condition of the patient, derived wholly from observation. Such a result would hardly be claimed in a case where the malady for which the patient was treated by the witness was cured, and had no effect upon or connection with his subsequent condition at the time respecting which the opinion was called for. But, in this case,

the theory of the defense at the trial is understood to have been that whatever malady Diefendorf was treated for by the witness in 1862 continued to afflict him in May, 1867, and to the time of his death. In that view of the case, it is difficult to see how the witness could have expressed an opinion respecting the health of Diefendorf in 1867 without being influenced, more or less, by what he learned of his condition during his attendance on him in 1862. The questions put to Dr. Eastman as to the cause of chronic diarrhœa and rheumatism, and the effect of those diseases, were also properly excluded. They were immaterial, unless they were pertinent to the issue as to whether Diefendorf had either of the diseases referred to, in which case, as we have seen, the testimony was within the prohibition of the statute.

3. A point is made that the court erred in excluding the testimony of the witness Spalsbury, a connection of Diefendorf by marriage, and well acquainted with him, a physician, but not the attending physician of Diefendorf, as to his knowledge and opinion of the physical condition of Diefendorf prior to the insurance, and within the limit of seven years named in the applications. The only question of that nature to which an objection was sustained, so far as I have discovered in reading the entire testimony of the witness, was one in which the witness was asked whether, in his opinion, Diefendorf was a healthy man in 1862, when witness first knew him. I gather from the case that the question was objected to on the ground that the time was too remote. It was five and six years before the respective applications. Obviously, if the witness had no knowledge of the state of Diefendorf's health subsequently to that time, his opinion was of little value; and, in view of all the testimony produced by the defendant as to the health of the assured in later years, it can hardly be said that the defendant was prejudiced by the ruling, even if it was erroneous. For instance, the same witness, Spalsbury, subsequently testified, on defendant's examination, that after 1862 Diefendorf lost in health from year to year; that his health was not as good in 1865 as in 1862, that in 1862 his voice was low, and it was always low when he knew him. The suggestion that the applications cover a period of seven years, probably has reference to the question, "Has the party had, during the last seven years, any severe sickness or disease?" The question



to Spalsbury was not whether the assured had a severe sickness in 1862, but whether, in the opinion of the witness, he was then a healthy man? We are of the opinion that if the ruling was erroneous, substantial justice does not require that a new trial should be granted on account of it, and the error should be disregarded. (Code of Civil Procedure, § 1003.)

4. The defendant's counsel called as a witness Dr. Picot, who certified in the proofs of death submitted by the plaintiffs to the insurance company, that the assured died of nervous apoplexy; and asked him to state what causes may produce nervous apoplexy. The testimony was excluded. By the witness, Dr. Swart, the defendant's counsel offered to prove that death by nervous apoplexy is the result of some disease or diseases of long standing, and not of a sudden cause. An objection to the offer was sustained. We think these rulings were correct. So far as can be learned from the question and offer, the testimony was immaterial. It was not proposed to show that the death of Diefendorf or the disorder which was certified to have produced it, was the result of any disease covered by the representations of the assured, and within the issues made by the answer.

5. The same remark is applicable to the question put to the witness Tennant, calling on him to state whether he knew any thing of Diefendorf's limbs swelling in 1870, or at any time? It does not appear to have been material to the issue.

6. The witness, Goodall, testified on direct examination by the plaintiffs, that he examined Diefendorf for insurance in the Phoenix Life Insurance Company about the time of the second application in this case, and passed him as properly insurable. On cross-examination he was asked whether he would have recommended Diefendorf for insurance if the latter had informed witness that he had been treated by any of the five physicians who had attended him for a disease which he was unwilling to disclose, or that he had been under treatment for five years? Two other similar questions were put to the same witness, and one to the witness, Dr. Clark. An objection to each question was sustained. We think the testimony was incompetent. It was of no importance to know what the action of the witness would have been in the hypothetical case stated, or what, in their opinion, would have been a good or bad risk for an

insurance company to take under the supposed state of *facta*. Similar testimony was held to be incompetent in *Ravols v. American Mutual Life Insurance Company* (27 N. Y., 282, *per* WRIGHT, J., p. 293), and cases cited by him.

7. It is claimed that the court erred in allowing the plaintiffs' witness, Dr. Simmons, a physician, to testify to the opinion he formed upon an examination of Diefendorf, at his request. The claim is based upon the idea that the information the witness acquired was privileged by the statute already referred to. We are of the opinion that the transaction between the witness and Diefendorf was not within the statute. The witness was the county clerk, and on one occasion when Mr. Diefendorf, who was an attorney, was in the clerk's office, he requested the witness to look at an eruption upon his skin, and the witness did so, on that occasion only, and gratuitously. He examined his face and back, and at the trial expressed an opinion as to the character and cause of the eruption. Undoubtedly, as he testified, he made use of his knowledge and learning as a physician in forming his opinion, and it was in the confidence that he possessed medical skill that Diefendorf requested his examination; but it can hardly be said that he attended Diefendorf as a patient, in a professional character, certainly not that the information acquired by him was to enable him to prescribe for him as a physician. It does not appear that any prescription was made or asked for. Ordinarily, perhaps, it is to be presumed, in the absence of proof to the contrary, that when a physician attends a person as a patient, in a professional character, he does so for the purpose of prescribing for him, but here we think the presumption does not arise, for the reason that the relation of physician and patient contemplated by the statute did not exist. Aside from this, the seal of confidence impressed by the statute is for the benefit of the patient, and may be removed by him, or with his consent. (*Johnson v. Johnson*, 14 Wend., 637, *per* SAVAGE, Ch. J., 641.) And, as was said by MILLER, J., speaking for the Court of Appeals, in the case of *Edington v. Mutual Life Insurance Company* (67 N. Y., 185), no valid reason is shown why an assignee does not stand in the same position, in this respect, as the original party, and the decease of the latter cannot affect the right of the former to assert this privilege.

8. The witness, Carpenter, testified, on direct-examination by the defendant, that, as a physician, he treated Diefendorf at different times from 1866 to 1868. He also gave the dates of his charges from his books, and stated that some of them were for advice merely. On his cross-examination, he was asked whether many of his charges were for advice simply. The question was objected to as immaterial, and the objection was overruled. It is now insisted that the question called for testimony that was not only immaterial, but was privileged by the statute. That it was not immaterial is obvious for it was within the range of a strict cross-examination. The objection that it was privileged was not taken at the trial and cannot be heard on appeal; but if it had been taken it would have been of no avail as the question did not call on the witness to disclose any information acquired by him as an attending physician.

Several exceptions to the charge, and to certain refusals to charge as requested, remain to be considered.

1. It is insisted by the appellant's counsel that the court erred in submitting to the jury to say what was the meaning of the words "subject to" in that part of the applications in which Diefendorf answered "no" to the question whether he was subject to dyspepsia, dysentery or diarrhoea. The ground taken is that the question was one of interpretation of the contract, and was for the court and not for the jury. It is by no means certain that it was erroneous to submit to the jury to say what the parties intended by the words "subject to." In *Swift v. Massachusetts Mutual Life Insurance Company* (2 N. Y. S. C. [T. & C.], 302) it was held that it was for the jury to determine what construction should be put upon the word "unknown" disease inserted in an application for insurance, whether as referring to the knowledge of the party or of everybody. In *Penniman v. Hudson* (14 Barb., 579), where there was no conflict of evidence, it was said to be for the jury to say whether a party had used "due and legal diligence" within the meaning of his contract.

But it appears from the whole charge that the jury were instructed, in effect, that if Diefendorf had been attacked by either of the diseases named, not once or twice only but habitually, if the disease had taken possession of him substantially, then he was subject to it. That instruction was, in substance, a construction of the words and it was as favorable to the defendants as they had a right to ask.

2. Another part of the charge urged as erroneous is that which submitted to the jury the question whether Diefendorf answered truly the question whether he had applied to other companies for insurance and with what result. It is insisted that there was no dispute about the facts, and there was no question for the jury. The answer to the question was "yes, and always successful." The witness Windsor, called by the defendant, testified that in 1862 or 1863 he was an agent of the Mutual Benefit Insurance Company of Newark, New Jersey, that Diefendorf presented to him a written application for insurance; that the agent told him he did not think the company would take him, that Diefendorf insisted, and at his request the agent handed the application to the medical examiner of the company, who was Diefendorf's physician in 1862; that the agent subsequently informed Diefendorf that the examiner said he could not pass him, and the examination was a farce and an unnecessary expense to put the company to, and that he was uninsurable, and there the matter dropped. It is insisted that this testimony, which was uncontradicted, showed clearly that Diefendorf's answer was untruthful. The question in the application was this: "Has any application been made to this or any other company for assurance on the life of the party, if so, with what result?" The judge submitted it to the jury to say whether, within the fair meaning of the question, there could be said to have been an application to the New Jersey company for insurance, the application never having been presented to the company, or filled out by the examiner for presentation, or used in any manner, except as above stated. Of that disposition of the matter the defendant certainly ought not to complain. It is probably correct to say there was no question for the jury, but it is so because there was no proof that an application had been made to the New Jersey company. The application could only be made to the home office. The local agent could receive it for transmission to the office of the company by whom it was to be passed upon, but the delivery of it to him for that purpose would not have been an application to the company for insurance, and it was not delivered to him for any purpose. It was never, in fact, completed, and the idea of furthering it was abandoned. If Diefendorf had sworn to the answer in the application to the defendant, on which this discussion arises, could perjury have

been assigned upon it, under the circumstances testified to by Windsor? It seems not, clearly, and if so, the judge might have held properly, as matter of law, that the transaction in question constituted no defense, but his failure to do so did not harm the defendant.

3. The court submitted to the jury the question whether the answers of Diefendorf in both applications were true. Each of the applications contained this question (numbered 12): "Has the party had inflammatory rheumatism?" The answer in the first application was: "Once, years ago (bad);" in the second, "No." Each application contained also this question (numbered 16): "Has the party had, during the last seven years, any severe sickness or disease; if so, state the particulars and the name of the attending physician, or who was consulted and prescribed?" The answer in the first application was: "Has had nervous difficulty and diarrhoea; C. H. Carpenter, Geneva, N. Y.;" in the second, "No."

In regard to the answer to the twelfth question in the second application, the court instructed the jury to find whether it was satisfactorily proved that the applicant had had inflammatory rheumatism. To the submission of that question no exception was taken, and it is plain there was no ground for an exception. The statement in the first application, that he had once had inflammatory rheumatism, was not conclusive against the plaintiff's right to recover on the second policy. It was but an item of evidence to be weighed by the jury, and if, upon the whole case, they were satisfied that Diefendorf had never had the disease mentioned, the statement did not affect the validity of the latter policy.

Respecting the answers to the sixteenth interrogatory, the jury were instructed to find whether the nervous difficulty or diarrhoea stated in the first application in fact amounted to a severe illness, the question put to the applicant being whether he had had any severe sickness or disease. The jury must be presumed to have found that the attacks of illness above mentioned were not severe, and if their verdict is warranted by the evidence, the apparent discrepancy between the two statements is of no importance.

4. The defendant's counsel claimed, that the second application gave an untruthful answer to the question, "name the residence of the family physician of the party, or of one whom he had usually

employed or consulted." The answer was, "C. H. Carpenter, N. Y." The defendant's counsel contended that Dr. Picot, of Geneva, was shown to have been the attending physician at the time. The court charged that it was for the jury to say whether the applicant was bound under that question to name all the physicians who might have treated him, or whether the question called for his family physician or one who was usually employed by him. The court further charged that if it only called for the latter, and Dr. Carpenter was the one, the answer was truthful; but if the question called for all the physicians who had treated him, the answer was not truthful.

It is now objected that this part of the charge submitted to the jury to determine the meaning of the sixteenth question in the application was erroneous. The exception taken at the trial did not specify that objection. The exception was general to the whole of this part of the charge. The part of the charge so excepted to embraced several propositions, some of which were unexceptionable, and consequently an objection to one of them only is not now available.

Of the exceptions taken to the refusals to charge as requested it is sufficient to say that all the requests seem to be fully covered by the charge, except the sixth and seventh, and they, in our judgment, were properly refused. The sixth called for an instruction to the effect that the omission of the plaintiffs to prove by the attending physician the nature of the diseases for which he treated Diefendorf raised a presumption against them in that respect. The statute which made confidential the disclosures to the physician is an answer to that request. By the seventh request the court was asked to charge the jury that the plaintiffs, as to their cause of action on the second policy, were bound by the answers of Dr. Carpenter, the medical examiner, that Diefendorf had had neuralgia. In the medical certificate of May, 1867, the question is put to the examiner, "Whether any signs of apoplexy, epilepsy, insanity, or any other nervous affection, or of predisposition to them?" The answer was "No; has had neuralgia." In May, 1868, when the second application was made, the same question was put to the same medical examiner and he answered, "None." The question called for an opinion and nothing more. The opinion given in each case was

the same. The fact that the party had had neuralgia was stated in the answer in the first case and not in the second. But whatever effect the statement had on the rights of the assured or of the plaintiffs it was, at most, but an item of evidence to be weighed by the jury and was not conclusive.

It is urged that the verdict is against the weight of evidence, and that the judge who presided at the trial erred in denying the motion to set it aside on that ground. While the testimony shows, without dispute, that Diefendorf was for many years in a state of health by no means sound, yet it was for the jury to say, upon all the evidence, whether any of the facts existed which were alleged in the answer as matter of defense. We see no ground for disturbing their verdict.

The order denying a new trial should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Order denying new trial affirmed.

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LEVI W. HALL, RESPONDENT, v. JOSEPHINE F. CROUSE,  
ADMINISTRATRIX, AND WILLIAM COWIE, ADMINISTRATOR, ETC.,  
OF HENRY CROUSE, IMPLEADED, ETC., APPELLANTS.

*Mortgage to secure future advances—object of, may be proved by parol—Advances made after attaching of subsequent lien—Security for future costs—may be taken by attorney.*

A mortgage may be executed or a judgment confessed as security for future advances, to be made in pursuance of a cotemporaneous agreement, and such mortgage or judgment will be valid and effectual as against subsequent incumbrancers having notice thereof. All advances made after the attaching of a subsequent lien, by mortgage or judgment are subject to the priority of the latter lien. The object for which the mortgage is given and the amount of the advances made may be shown by parol.

Parol evidence is also admissible to show that the mortgage was given to secure advances to be made by a party not named in the mortgage.

The English rule prohibiting attorneys from taking, in advance, a security for the payment of the future costs of the litigation is not in force in this State.

APPEAL from a judgment in favor of the plaintiff, entered on the report of a referee.

The action was brought to foreclose a mortgage. The referee before whom the action was tried found that, on the 16th day of May, 1876, the defendant, James Clary, executed and delivered to the plaintiff his bond, under seal, conditioned for the payment to the plaintiff of the sum of \$1,000 and interest in three months from the date thereof, and at the same time executed, acknowledged and delivered to the plaintiff, as collateral to said bond, a mortgage on premises described in the complaint, which mortgage was recorded in the clerk's office of Onondaga county on the 16th day of May, 1876. That the consideration upon which said bond and mortgage was executed was as follows: Isbun N. Ames, previous to the giving, and at or about the date of said bond and mortgage, had rendered legal services for James Clary. Levi W. Hall, the plaintiff, was consulted by Clary about his matters, he being under indictment for receiving stolen goods, and having other litigation. Mr. Hall, before he would engage in his behalf, required Clary to secure him for services which he might render. It was then agreed between Ames, Hall and Clary that Clary should execute the bond and mortgage described in the complaint as security for services rendered, or which might thereafter be rendered by Ames for Clary, and for services which might thereafter be rendered him by Hall. Under this arrangement Hall rendered services of the value of \$335, and Ames rendered service of the value of \$410, including the services before then rendered by him for Clary, making in all the sum of \$745. The defendant, Henry Crouse, recovered judgment against the defendant, James Clary, on the 25th day of July, 1876, for damages and costs, \$414.31. It appeared that one item of Ames' charges against Clary accrued subsequently to the recovery of the Crouse judgment. As matter of law, on the foregoing facts, the referee found that there was due and unpaid on said bond and mortgage the sum of \$745, and that the plaintiff was entitled to a decree of foreclosure and sale for that amount, which he directed, with costs.

*Edwin A. Kingsley*, for the appellants.

*Levi W. Hall*, respondent, in person.



SMITH, J. :

This action was brought to foreclose a real estate mortgage executed by James Clary to the respondent as collateral security for the payment of a bond given at the same time. Henry Crouse, the appellant's intestate, was a subsequent judgment-creditor of Clary, and he defended, alleging that the mortgage was fraudulent and void, as against the creditors of the mortgagor. The bond was conditioned for the payment of the sum of \$1,000 in three months from its date, with interest, and the like sum was the consideration expressed in the mortgage. Crouse having died subsequently to the commencement of the suit, the appellants were substituted in his place as defendants.

At the trial the plaintiff offered parol evidence tending to show that the bond and mortgage were executed to secure the plaintiff and Mr. Ames for any legal services which had been or might be rendered by them or either of them for Clary. An objection to the offer was overruled and the evidence was received.

It is contended by the appellants' counsel that notwithstanding parol evidence is, in general, admissible to show the actual consideration, although it be different from that expressed in the deed, the rule is limited to cases where the inquiry is material to an action between the parties to the deed. It is not necessary to decide that point in the present case, for the reason that if any error was committed at the trial in receiving the evidence, it was merely as to the order of proof. The plaintiff offered the evidence before he rested. It was not then material or necessary to his case, and if nothing had occurred subsequently to make it material, the reception of it probably would have been erroneous. The plaintiff having proved his bond and mortgage, was entitled *prima facie* to the relief demanded in his complaint without further proof. The burden of impeaching the consideration expressed in the mortgage and of showing fraud was on the defendant. For that purpose the defendant had a right to give parol proof of a different consideration from that expressed, and in fact he gave evidence to that effect. To that evidence it was competent for the plaintiff to reply, on the issue of fraud, and to give his version of the true consideration. All the evidence given by the plaintiff upon the subject, against the defendants' objection, was material and admissible for that

purpose, and if it had been offered after the defendant had opened the door to that inquiry, it would have been entirely unobjectionable. It is obvious that the defendant was not prejudiced by the reception of the evidence before he took the case, as he was thereby advised of the strength of the plaintiff's proof on that issue before he entered on his own.

It is next suggested for the appellants, that as nothing appears in the mortgage to show that it was intended as a security for future services, it is void against creditors so far as it was intended to cover such services. The position cannot be maintained. The law is well settled in this State, that a mortgage may be executed or judgment confessed as security for future advances, in whole or in part, made pursuant to a contemporaneous agreement, and will be an effectual security for such advances against subsequent incumbrances having notice of the judgment or mortgage. (*Truscott v. King*, 6 N. Y., 147.) It is necessary, however, that the agreement, as contained in the record of the lien, whether by mortgage or judgment, should give all the requisite information as to the extent and certainty of the contract, so that a junior creditor may, by inspection of the record, and by common prudence and ordinary diligence, ascertain the extent of the incumbrance. (*Id.*, Op. of JEWETT, J., p. 161, and cases cited by him.) Parol evidence is competent to show the object of the mortgage or judgment, and the amount of advances upon it. (*Id.*) But neither a mortgage or judgment can be rendered available to secure the party taking them, for future advances or responsibilities, by any subsequent parol agreement, in preference to the lien of a junior incumbrance. (*Id.*, pp. 161, 162; *Walker v. Snediker*, 1 Hoff. Ch. R., 145; *Ex parte Hooper*, 19 Ves., 477; 4 Kent's Com., 176.) Where, however, a mortgage is given to secure future advances, the omission to state in it the object, subjects it to suspicion, and the holder will be put to strict proof of the payment of the consideration. (*Craig v. Tappin*, 2 Sandf. Ch. R., 78.) In the present case the mortgage and the parol agreement as to future services, made at the same time, are within the limitations above stated, and the mortgage is a valid security for the amount of such services found by the referee. The transaction appears to have been entirely fair on the part of the attorneys towards their clients, and there seems to be nothing inequitable in

enforcing it for the value of the services rendered, subject to the rights of intervening creditors.

It was also competent to show by parol, that by an agreement at the time between the parties to the mortgage and Ames, a part of the consideration was the services of Ames; in other words, that as to such part the plaintiff received the mortgage in trust for Ames. The evidence did not tend to contradict the mortgage (*Artcher v. McDuffie*, 5 Barb., 153), and the mortgage was a valid security for the services of Ames as well as those of the mortgagee, to the extent of the lien expressed in it.

There are some English cases holding that the courts will not permit an attorney to take a security in advance for the payment of the future costs of litigation (*Uppington v. Bullus*, 2 Drury & War. Ch., 188; *Jones v. Tupp*, Jacobs' Ch. R., 322; *Williams v. Negot*, id., 598; *Pitcher v. Rigby*, Price's Eq. R., 78); but in this State the courts have not gone to that extent. The only New York case cited by the appellants' counsel upon this point is *Merritt v. Lambert* (10 Paige, 352), which was affirmed by the Court for the Correction of Errors, *sub. nom.*, *Wallis v. Loubat* (2 Den., 607). That case was governed by the rule which prevailed before the Code that an attorney or solicitor could not be permitted to contract with his client previous to the termination of the suit for a part of the demand, or subject-matter of the litigation, as a compensation for his services. That was a suit for the specific performance of a contract for the exchange of lands. A receiver of the rents and profits of the premises in controversy had been appointed, and pending the suit the defendant sold his interest in one of his lots to a stranger, and such purchaser employed the defendant's solicitor to conduct the defense for him and agreed to give such solicitor all the rents and profits of the premises pending the litigation, in addition to the taxable costs of the defendant, who still retained a part of the premises in controversy, as an extra compensation for his services. It was held that such rents and profits constituted a part of the subject-matter of the litigation and that the agreement to give the same to the solicitor for his professional services was void, and that the solicitor was only entitled to his taxable costs as between solicitor and client. But under the provisions of the Code (§ 303), which is still in force, an attorney may stipulate with his client for

a part of the recovery as a compensation for his services. (*Benedict v. Stuart*, 23 Barb., 420.) But in the present case the agreement was not for a share of the subject-matter of the litigation, nor had it a direct tendency to prolong litigation like the agreement in *Merritt v. Lambert* (*supra*). It was merely an agreement by a client to secure his attorney and counsel for past and future services. We are not aware of any rule of law in this State which is violated by the agreement, or of any case in this State holding that such an agreement is void. Undoubtedly the mortgage in this case is subject to the scrutiny with which all transactions between attorney and client, and other parties in confidential relations to each other, are always regarded by the courts. That the client, Clary, executed the mortgage voluntarily, understanding its import, and that he has received the value of the amount reported due upon it, is obvious from the evidence and the findings of the referee. To that extent, we think it is a valid security.

Upon the questions of fact as to what was the true consideration of the mortgage, whether Clary was insolvent at the time of its execution, and whether the parties to it knew at the time that if enforced it would defeat the defendant Crouse in the collection of his demand, the testimony is conflicting and the findings of the referee are conclusive. The exceptions to his findings, and to his refusal to find as requested, on those questions are not well taken.

It is insisted that the hypothetical question put to the witness, Mr. Lyman, was improper, for the reason that it was inaccurate in respect to two of the facts stated as a basis for his opinion of the value of certain services rendered. No exception was taken pointing specifically to those inaccuracies. The only exception on that head was general, that the question assumed facts not proven. It assumed many other facts, which it is to be presumed were proven, since only the two above referred to are now alleged to be unproved. If the objections now urged had been pointed out at the trial, they might have been obviated. They are not now available to the appellant.

One other point remains. It is a settled rule that although a mortgage to secure further advances or services is valid, even when it does not express the object, yet advances made or services rendered after the attaching of a subsequent lien by mortgage or judg-

ment are subject to the priority of the latter lien. An opinion to that effect was expressed by Chancellor KENT, in *Brinkerhoff v. Marvin* (5 Johns. Ch., 320, 327). The point was expressly decided in *Lansing v. Woodworth* (1 Sand. Ch., 43) and *Goodhue v. Berrien* (2 id., 630; see, also, *Yelverton v. Sheldon*, id., 481). The referee allowed the claim of Ames at the sum of \$410, which, as appears from Ames' testimony, includes an item of thirty dollars for services in defending Clary in supplementary proceedings instituted on Crouse's judgment. That item should be excluded from the amount for which the plaintiff's mortgage is given priority over the judgment.

If the plaintiff consents to that reduction, the judgment so modified should be affirmed, without costs of the appeal to either party; otherwise the judgment should be reversed and a new trial ordered before another referee, costs to abide event.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

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SARAH D. HAWKINS, RESPONDENT, v. WALLACE W. MOSHER, SURVIVING ADMINISTRATOR OF THOMAS HARTER, DECEASED, APPELLANT.

*Covenants of indemnity and covenants to perform specific acts — distinction between — Measure of damages upon loss of leasehold interest — evidence as to.*

Plaintiff and defendant's intestate entered into an agreement whereby the latter agreed, in consideration of a sum of money paid to him by plaintiff, to procure the discontinuance of two foreclosure actions then pending, and to purchase certain mortgages and hold them until the expiration of a lease, owned by plaintiff, of the mortgaged premises, so that she might enjoy the use of the same during the term of the lease. The intestate having failed to purchase, two of the mortgages were foreclosed, and just as the premises were to be sold the plaintiff sold out her lease for \$625. The lease had then two years and three months to run, and all the rent, except for one year, had been paid in advance at the rate of \$500 a year.

In an action to recover damages for a breach of the agreement, *held*, that the plaintiff was not bound to wait for an actual eviction, but that the agreement was broken as soon as the intestate failed to perform the specific acts required by the agreement, viz., to purchase and hold the mortgages.

13	563
92	296

That she was entitled to recover as damages the actual value of the premises for the unexpired term of the lease after deducting therefrom the rent to be paid.

*Held*, further, that in determining the value of the use of the premises the referee was not confined to the receipts from and the expenditures upon them.

The distinction between a covenant of indemnity and a covenant to do a specific act, discussed.

APPEAL by defendant from a judgment entered on the report of a referee on a claim presented by plaintiff against the estate of the defendant's intestate, and also from an order made at the Special Term confirming said report.

*G. W. Smith*, for the appellant.

*J. A. Steele*, for the respondent.

SMITH, J. :

By the terms of the parol contract between the plaintiff and the defendant's intestate, as found by the referee, the latter party agreed, in consideration of the sum of \$821.22 to him paid, to prevent a foreclosure sale of the premises of which the plaintiff was the lessee, and to procure the foreclosure proceeding, then pending, on two of the four mortgages which covered the premises to be discontinued, and to purchase all of said four mortgages and hold them until the expiration of the plaintiff's lease, so that the plaintiff could occupy the premises and have the benefit of the same during the full unexpired term of the lease. The plaintiff paid the consideration and the agreement was partly executed by the intestate. But he neglected to purchase all of said four mortgages and hold them. Foreclosure proceedings were commenced on two of them, and prosecuted to a notice of sale; during the plaintiff's term a sale being about to take place, she sold her lease for \$625, there being about two years and three months of the term unexpired, for all but one year of which she had paid rent in advance at the rate of \$500 a year. The referee found that the use of the premises was worth \$500 a year more than the amount of rent agreed to be paid. The plaintiff claimed, in her statement of claim, \$800 on account of the excess of the value of the lease over the rent, which sum, with interest on it from the date of the expiration of her term, and some minor claims, which were not disputed, the referee allowed to the plaintiff.

It is contended by the appellant's counsel that the substance of Harter's agreement was merely that the plaintiff should have quiet enjoyment, and that until ousted, there was no breach. The agreement was more than that. It was to do certain specific acts, to wit, to purchase the outstanding mortgages, and hold them until the expiration of the plaintiff's term. On the failure of the intestate to do either of those things, his agreement was broken. The difference between mere covenants of quiet enjoyment and covenants to do some specific acts, the object of which is to secure the possession of the covenantee, is recognized by numerous decisions. In the former class there is no breach till actual eviction. (*Waldron v. McCarty*, 3 Johns., 472; *Kortz v. Carpenter*, 5 id., 121; *Sedgwick v. Hollenback*, 7 id., 376; *Kemball v. Van Slyke*, 8 id., 487; *Kerr v. Shaw*, 13 id., 236.) In the latter class failure to do the specific thing stipulated for, gives a right of action, even though the possession be not disturbed. (*Juliand v. Burgott*, 11 Johns., 477; *Thomas v. Allen*, 1 Hill, 145; *Gilbert v. Wiman*, 1 N. Y., 550; *Rector, etc., of Trinity Church v. Higgins*, 48 id., 532.) The present case has been before this court on a former appeal, and on that occasion it was held, in effect, that the agreement of Harter was broken by his failure to purchase all four of the mortgages, so that the plaintiff had a perfect cause of action, and a judgment of nonsuit which had been theretofore ordered was set aside and a new trial ordered. (MS. op. of GILBERT, J.) This brings us to the question, what is the proper measure of recovery? Nominal damages, or the value of the unexpired portion of the term? I think the latter. The term of the lease was subject to the outstanding mortgages, and their amount largely exceeds its value. A foreclosure and sale under them would have deprived the lessee of her entire interest. To secure to her that interest was the purpose of the arrangement. The object was not to indemnify her in case of an eviction, but to prevent the possibility of an eviction, and to make her term worth to her what it would have been worth if the mortgages had not been in existence. The extent of the probable loss of value by reason of the existence of the incumbrances is the measure of damages, even though the lessee paid nothing on account of the incumbrances, and was not disturbed in her possession. These views are sustained by authority. In *Port*

*v. Jackson* (17 Johns., 239), the plaintiff, who was the assignee of a lease for a term of years, had assigned the same to the defendant, and the latter had covenanted to perform all the covenants, etc., to be performed by the plaintiff, among which was a covenant to pay the rent as it should accrue upon the lease. The action was covenant to recover the amount of rent alleged to be due to B., the plaintiff's assignee, for about twenty-four years. Defendant pleaded that before any rent became due, he assigned the term to G., who entered and was accepted by B. as his tenant. *Held*, on demurrer, that the plea was bad; that the defendant's covenant was express to pay the rent, etc., for which the plaintiff remained liable on his covenant to B. by privity of contract, notwithstanding the assignment by the defendant to G. and the acceptance of him by B. as his tenant; that the defendant's covenant was broken by the non-payment of the rent, and the plaintiff was entitled to recover the whole rent in arrear, for which he was liable on his covenant with B., though he had paid nothing, and had not been damnified. In *Gilbert v. Wiman* (*supra*), it was said by PRATT, J., in the Supreme Court, after stating the rule as to strict contracts of indemnity against damages: "But in personal contracts, where the instrument deviates the least from a simple contract to indemnify against damages, even when indemnity is the sole object of the contract, and when in consequence of the primary liability of other persons, actual loss may be sustained, the decisions of our courts, although by no means uniform, have gradually inclined towards fixing the rule to be one of actual compensation for probable loss, so that in contracts of that character it may now be considered as a general rule both in this country and in England." Although the decision of the Supreme Court in that case was not concurred in by the Court of Appeals, the rule above stated was not questioned, the latter court holding that the obligation sued on was one of indemnity merely. In the case of *The Rector, etc., v. Higgins*, above cited, it was held by the Commission of Appeals that a covenant in a lease, whereby the lessee agrees to bear, pay and discharge all taxes and assessments which shall be imposed upon the demised premises during the term, is broken when the lessee neglects to pay a tax or assessment duly imposed. It is not simply a contract of indemnity, but by it the tax or assessment, as between the parties,



becomes the debt of the lessee; the lessor, therefore, can maintain an action thereon without first paying the tax or assessment, and, as damages, he is entitled to recover the amount of such tax or assessment. And the general doctrine was asserted that parties have the right to make a contract contravening the rule that actual compensation will only be given for actual loss, and where the intent so to do is expressed in apt and suitable language, courts of justice will support it. In that case, LEONARD, C., cited many other cases (p. 537) which support the rule of damages above suggested, to wit, compensation for the probable loss against which the parties by their agreement intended to provide. Another point deserves consideration. It seems that in an action by a lessee against the lessor, on a covenant for quiet enjoyment, to recover damages for an eviction, he can recover nothing for a rise in value of the use of the demised premises. (*Kinney v. Watts*, 14 Wend., 38; *Kelly v. Dutch Church of Schenectady*, 2 Hill, 105.) The cases so holding proceed upon the ground that the lessee stands upon the same footing as a purchaser who, in an action for a breach of a covenant for quiet enjoyment, is held to the price agreed upon by the parties as the true value of the land. By analogy, the rents reserved in a lease, where no other consideration is paid, are regarded as a just equivalent for the use of the demised premises; but that rule has not been very satisfactory to the courts of this country. (*Mack v. Patchen*, 42 N. Y., 167.) Its soundness has been questioned (Sedg. on Dam. [1st ed.], 170), and we think it is not to be extended beyond this class of cases, to wit, actions between lessee and lessor, to which it has been applied. In our opinion, the correct measure of damages in this case is the value of the unexpired portion of the plaintiff's term, less the rent reserved. (*Mack v. Patchin*, *supra*.) The appellant's counsel insists that the referee erred in admitting evidence of the worth of the use of the premises, he contending that the true mode of ascertaining the damages was to show the receipts and expenses. The evidence was properly received.

The judgment and order should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment and order affirmed.

## WILLIAM H. SAUNDERS, RESPONDENT, v. DWIGHT S. CHAMBERLAIN, APPELLANT.

*Contract—measure of damages—Answer—general denial in—what cannot be proved under—Power of County Court to amend pleading.*

Upon the representation of the defendant that he was the owner of a bond and mortgage given by the plaintiff, and which was then overdue, the latter agreed to and did pay to the former \$120 upon his agreeing to carry the bond and mortgage for a year. Defendant did not own the mortgage, but by paying the owner of it \$100 induced him to carry it for a year. Upon the foreclosure of the mortgage this \$100 was allowed as a payment upon it.

In this action, brought by the plaintiff to recover damages occasioned by the fraudulent representation of the defendant, *held*, that plaintiff was entitled to recover the twenty dollars, not applied upon the mortgage, with interest.

The answer contained a general denial, and also denied that plaintiff was the proper or real party in interest, and alleged that he had no legal or equitable right to prosecute the action. *Held*, that under such answer the defendant could not prove an assignment of all the estate of the plaintiff to an assignee in bankruptcy, nor the schedule of his property.

*Quere*, whether upon an appeal from a judgment of the Justices' Court the County Court has power to allow an amendment to the answer.

APPEAL from an order of the Wayne County Court denying a motion for a new trial, made on the minutes of the judge, in an action brought to that court by appeal from a Justice's Court.

In 1872 the plaintiff had title to lands in Galen, on which he had executed a mortgage of about \$4,500 to one W. H. Lyon. Lyon had assigned the mortgage to Aaron Griswold.

In 1872, and after assignment to Griswold, and while Griswold owned the mortgage, defendant called upon plaintiff and stated to plaintiff that he owned the mortgage; that it had been assigned to him by Griswold; that there were payments due on the mortgage and he wanted it settled. The plaintiff, relying upon such statements, made an agreement with defendant by which defendant agreed to carry said mortgage, and defer payment one year, in consideration of plaintiff's paying defendant \$120, in addition to the legal interest. In pursuance of such agreement, plaintiff paid to defendant, and defendant received for the purpose aforesaid, the sum of \$120. At the time the defendant did not own the mortgage,

and it had not been assigned to him. After defendant had made the agreement with plaintiff to carry said mortgage for a year, and before the \$120 had been paid by plaintiff, defendant went to Mr. Griswold, the owner of the mortgage, and asked him if he would carry the mortgage a year for \$100; Griswold consented to this; afterward, and some time in the year 1873, Mr. Griswold assigned and sold said mortgage to one Henry Graham, who thereafter commenced a foreclosure of said mortgage, in which said Saunders interposed a defense, among other things, claiming that the \$100 received by Mr. Griswold as aforesaid should be applied on said mortgage, and the same was allowed and applied on the mortgage in said action; some time in January, 1877, plaintiff brought an action in a Justice's Court against defendant to recover the said \$120, or so much thereof as he was entitled to; and in said action recovered, before said justice, twenty dollars and interest and costs, amounting in the whole to thirty dollars and twenty cents, from which judgment the defendant appealed to the Wayne County Court, where said cause was tried before Hon. G. W. COWLES and a jury, when the plaintiff again had a verdict of twenty-six dollars and thirty-five cents.

The answer of the defendant contained a general denial, and also denied that plaintiff was the proper or real party in interest, and that he had any legal or equitable right to prosecute the action against the defendant. Under this answer defendant offered to introduce in evidence an assignment by plaintiff of his estate to an assignee in bankruptcy, which offer was refused.

*D. S. Chamberlain*, appellant, in person.

*J. Vandenburg*, for the respondent.

SMITH, J.:

The evidence, although conflicting, authorized the jury to find that the plaintiff was induced to pay the defendant \$120 to carry the bond and mortgage for a year by the representation of the defendant that he owned the bond and mortgage, and that such representation was untrue. The intendment from their verdict is that they so found. Upon this state of facts, the only question on the merits is whether the plaintiff was misled to his injury. That

he was damnified seems clear. Had the defendant been the owner of the bond and mortgage, the plaintiff could have insisted, in equity, that the \$120 should be regarded as a payment upon them, the agreement for forbearance being usurious. (*Crane v. Hubbell*, 7 Paige, 413; *Judd v. Seaver*, 8 id., 548.) The \$100 which the defendant paid to Griswold for the same purpose was so applied, it having been treated as a payment for the plaintiff's benefit; but as to the remaining twenty dollars, no such application was or could be made, it not having been paid to the true owner of the bond and mortgage. To the amount of the twenty dollars the plaintiff was damnified, and has a right of action; and the verdict being for that amount of damages only, with interest, is not excessive as claimed by the appellant.

The defendant's offer to prove the assignment and schedule in bankruptcy was properly excluded, for the reason that the answer did not set up that the plaintiff had transferred the claim in suit. Such transfer, to have been available as a defense, should have been pleaded as new matter. Proof of it was not admissible under a general denial; nor was it admissible under the second count in the answer, which averred a mere legal conclusion, to wit, that the plaintiff was not the proper party in interest in the action, and had no right to prosecute the same. The issuable facts should have been alleged. (*Russell v. Clapp*, 7 Barb., 482; *Seeley v. Engell*, 17 id., 530, reversed, but not on this point, 13 N. Y., 542; *Fosdick v. Groff*, 22 How., 158.)

The refusal of the court below to allow an amendment of the answer (even if the court had power to allow an amendment on appeal from a Justice's Court, a point which it is not necessary to decide) was matter of discretion, and cannot be reviewed on appeal.

The point that the action cannot be maintained because it was not brought within a year after the money was paid is not well taken. The action is not to recover money paid upon a usurious agreement, but to recover damages sustained by means of the alleged misrepresentation.

The order should be affirmed.

MULLIN, P. J., and TALCOTT, J., concurred.

Order affirmed.

SAMUEL B. UPHAM AND OTHERS, ASSIGNEES OF GEORGE F. PADDOCK AND MERRITT ANDREWS, BANKRUPTS, APPELLANTS, v. OSCAR PADDOCK AND OTHERS, RESPONDENTS.

*Collector's bond — sureties upon — rights of.*

A bank collected the rents of certain real estate in Watertown as the agent of the owners, George F. Paddock, Oscar Paddock and Edwin L. Paddock, from December 8, 1874, to October 29, 1875. On the former date Blood, Sawyer and George F. Paddock signed as sureties the bond of one Rogers, as collector of the town of Watertown, which bond was duly filed. Rogers failed to pay over the sum of \$11,848.68 of the taxes collected by him, but deposited it with a firm of bankers, of which George F. Paddock was a member, which firm converted the money to its own use and then became bankrupt. On October 29, 1875, Paddock's interest in the real estate was sold under a judgment recovered in an action brought by the supervisors upon the bond, the proceeds thereof being insufficient to pay the amount of the judgment for which the other sureties were liable. This judgment directed that the real property of Paddock should be first sold thereunder, before resorting to the property of his co-obligors. In an action by the assignees in bankruptcy of the firm to recover from the bank the bankrupts' interest in the rents collected by it, the other sureties claimed that as between them and Paddock, the latter was primarily liable for the moneys converted by his firm, and that they could avail themselves, in equity, of the lien of the bond on his real estate; and that he being insolvent, and his real estate being inadequate security, they could reach the rents by means of a receiver, in the same manner that a mortgagee could under like circumstances. *Held*, that this claim could not be sustained and that the assignee was entitled to the money.

*Seemle*, that the lien created by the filing of a collector's bond is analogous to that of a judgment creditor, and not to that of a mortgagee; and the owner of the property has a right to redeem and a right to the possession, and to receive the rents and profits after a sale thereunder, the same as after a sale under an ordinary judgment.

APPEAL from a judgment in favor of the defendants, entered on the decision of a judge at the Jefferson Special Term.

*D. O'Brien*, for the appellants.

*Starbuck & Sawyer*, for the respondents, Richardson, Blood and Sawyer.

*F. W. Hubbard*, for the respondents, Paddock and the First National Bank of Watertown.

SMITH, J.:

The plaintiffs sue as assignees in bankruptcy of George F. Paddock, an adjudged bankrupt, to recover the share of the bankrupt in the rents of certain real estate owned by him and the defendants, Oscar Paddock and Edwin L. Paddock, as tenants in common. The rents accrued from 8th December, 1874, to 29th October, 1875, and were collected by the defendant, the First National Bank of Watertown, as the agent of the owners of the real estate, and are now held by the bank. The bankrupt's share of the rents held by the bank amounts to the sum of \$2,937.30. The bank makes no claim to the money in its own right, but alleges in its answer that the defendants, Blood and Sawyer, have demanded the same of the bank, and that the bank is ready and willing to pay the same as the court shall order. Upon this state of facts it is obvious that the plaintiffs, as assignees, have the legal title to the money, and the right to recover the same from the bank as a part of the assets of the bankrupt, unless some of the other defendants have a superior right to it.

The only defendants who set up an adverse claim to the money are Blood and Sawyer. Their claim is based upon the following state of facts: On 8th December, 1874, Blood, Sawyer and George F. Paddock (the bankrupt), as sureties, with Jeremy W. Rogers as principal, who was the collector of the town of Watertown, executed the bond of said Rogers, as collector, to the supervisor of the town, and the same was duly filed and became a lien upon the real estate of the obligors. Rogers failed to pay over the sum of \$11,348.68 of the taxes collected by him, but deposited it with George F. Paddock & Co., bankers, a firm consisting of the said George F. Paddock and Merritt Andrews, which firm converted the money and afterwards became bankrupt. The supervisor sued the bond and recovered a judgment against all the obligors, which directed that the real estate of Paddock should be first sold to satisfy the judgment before resorting to the property of the other sureties. On 29th October, 1875, the real estate of Paddock was sold, being the property from which the rents in controversy arose and the avails were insufficient to pay the judgment by the sum of \$3,909.16, for which the other securities are liable. The ground upon which the claim of Blood and Sawyer was upheld at Special Term, and on which we are asked to affirm the judgment, is that as between them and Pad-

dock, the latter was primarily liable for the tax moneys converted by his firm, and they can avail themselves, in equity, of the lien of the bond on his real estate for their security; and that he being insolvent, and his real estate being inadequate security, they can reach the rents, by means of a receiver, the same as a mortgagee in like circumstances. By the decree the bank, defendant, was appointed a receiver for that purpose.

We are not prepared to affirm all of these conclusions. Grant that the real estate of the bankrupt is primarily liable, as between him and the other sureties (Blood and Sawyer), the latter are not in the position of mortgagees. The only lien they have upon the land of the bankrupt is that created by the collector's bond in favor of the supervisor, to whose rights they are perhaps entitled to be subrogated on paying the debt. We do not understand from the findings that they have actually paid. They are liable to pay. But waiving that point, the nature of the lien is to be considered. It is not a lien by mortgage, it is created by statute, and is more nearly analogous to a lien by judgment. The county clerk with whom the bond is filed is required to make an entry of it, in a book to be provided for the purpose in the same manner in which judgments are entered of record. (1 R. S., 346, § 20.)

The statute provides no special mode of enforcing the lien. The only mode, therefore, is by a suit on the bond to recover the amount due from the collector, and judgment being obtained, the real estate which is subject to the lien may be sold by the sheriff upon execution. That being the case, the owner of the land has the same right to redeem as other judgment-debtors whose lands are sold on execution, and in the meantime, and until title is perfected in the purchaser, by the sheriff's deed, the owner of the equity of redemption is entitled to the possession of the property, and to receive the rents and profits as his own. The equitable considerations which induce courts of equity, in their discretion, to permit a mortgagee to collect the rents and profits, through a receiver, *pendente lite*, where the land is inadequate security and the mortgagor is insolvent, have no application to the lien of a judgment-creditor, nor, as it seems to us, to a lien created by the filing of a collector's bond.

But if the reverse of this proposition were true, the defense must fail for another reason. Even a mortgagee has no specific

lien on the rents and profits, in the absence of a special clause to that effect in the mortgage, until a court of equity has determined that it is necessary for his security, and has appointed a receiver to intercept the rents and profits and divert them from the mortgagor. That had not been done in this case when the assignees commenced the present action. No receiver was appointed until the judgment was rendered which is now under review. Assuming, for the present purpose, that the respondents, Blood and Sawyer, are to be regarded, in equity, as mortgagees, the lien which they acquired by the appointment of a receiver, undoubtedly attached to the rents and profits then past due and owing from the tenants, if there were any such, but the respondents could not call on the assignees to refund rents and profits which the tenants had paid over to them or their agent before the receiver was appointed. (*Howell v. Ripley*, 10 Paige, 43; *Astor v. Turner*, 11 id., 436.) Prior to the commencement of this action the rents in controversy had been paid by the tenants to the bank, and were received and held by the latter as the agent of the owners of the real estate, of which the bankrupt was one. The title of the bankrupt to the real estate, and to such of the rents collected as had accrued at the time of the commencement of the bankruptcy proceedings, and to such as were thereafter to accrue, passed to his assignees. As between the bankrupt or his assignees on the one hand, and his co-tenants on the other, there was no dispute as to the amount of his share of the rents. The receipt by the bank of the share of the rents belonging to the estate of the bankrupt was, in law, the receipt of them by the assignees.

The bank held the money for its principals, by whom it was authorized to receive it, and not, as seems to be supposed by the respondents' counsel, as a trustee for the benefit of outsiders who might ultimately lay claim to the fund, but who had no valid claim to it, in law or equity, when the bank refused to pay it to the plaintiffs, and when the plaintiffs commenced suit to recover it. Not only, therefore, had the plaintiffs the legal title to the rents in question, but they had collected them from the tenants before the respondents procured the appointment of a receiver. This suit was necessary, simply because their agent, the bank, refused to pay over the money which it had collected for them. The bank was the only necessary defendant. Indeed, there is nothing in the com-



plaint showing that at the time of the commencement of the action the plaintiffs had any controversy with the defendants, Richardson, Blood and Sawyer, and it alleged no ground whatever for making them parties. And the co-tenants of the bankrupt, Edwin and Oscar Paddock, who were made defendants, did not answer the complaint. It would seem, too, from the stipulation which is made a part of the case, that Richardson, Blood and Sawyer were not made defendants originally, but were permitted by the plaintiffs to come in after the suit was commenced, and set up their claims by answer. That is of no consequence, however, except as showing that the only object of the suit, originally, was to compel the bank to pay the plaintiffs the money which it had received from them as their agents.

These views lead to the conclusion that the judgment should be reversed; and, as the facts are undisputed, judgment should be ordered for the plaintiffs for the relief specifically demanded in the complaint, with costs and disbursements of the action and appeal, against the respondents, Blood, Sawyer, and the bank.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

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WOOSTER SHERMAN, PLAINTIFF IN ERROR, v. THE PEOPLE  
OF THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

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*Obtaining money by false pretenses — admissions of plaintiff in error — what cannot be proved by.*

Upon the trial of the plaintiff in error for obtaining money by false pretenses the prosecution, in order to prove the existence of a mortgage upon the prisoner's house, produced a certificate of the clerk of Jefferson county tending to show the existence of a mortgage on defendant's house and lot in Watertown, which was rejected because it did not contain a copy of the whole mortgage. The district attorney was then sworn and testified, under objection, that in a certain conversation the defendant said to him that he owned a house and lot in Watertown worth \$40,000, which was incumbered by a mortgage of \$20,000 given to trustees to secure bonds negotiated by them.

*Held*, that as the prosecution had not accounted for the non-production of the mortgage itself, the record, or a copy thereof, the admission by the prisoner, was not admissible to prove the existence or terms of the mortgage.

*Semble*, that the admissions of a party are competent evidence, only when parol evidence of the facts sought to be shown by such admissions would be competent.

*Semble*, that admissions are never admissible to establish the legal effect of documents.

WRIT OF ERROR to the Court of Sessions of Cayuga to review a conviction of the plaintiff in error of obtaining property by false pretenses.

The charge was that Wooster Sherman, on the 1st day of November, 1876, obtained of one John Molley 300 promissory notes issued by the United States of America, and 300 promissory notes issued by divers national banks of the value of \$300, upon the false and fraudulent representations and pretenses (1) that he brought \$50,000 ready money to Port Byron, and (2) that he was the owner of a house and lot in Watertown, free from incumbrance, and worth \$40,000.

The negations in the indictment were that the said Sherman had no ready money at Port Byron, and that the said house and lot was incumbered by mortgage to its full value.

*F. W. Hubbard*, for plaintiff in error.

*S. E. Payne*, district attorney, for defendant in error.

SMITH, J. :

The counsel for the plaintiff in error insists that the court below erred in refusing to instruct the jury to acquit as requested. The evidence on the part of the prosecution tended to show that Sherman, who was a banker at Port Byron, by false pretenses induced the complainant to deposit currency in his bank; that the money so deposited was drawn out by the complainant and paid back to him some weeks afterward; and that subsequently he deposited a draft for collection, the larger part of which was unpaid when the bank closed. On that state of facts, it was insisted by the counsel for the defendant that no offense was committed in respect to procuring the deposit of the currency. We think the motion made on

that ground was properly overruled. The fact that the money deposited was paid back went to the question of intent; and if the jury were satisfied by the evidence that the deposit was induced by the false representations charged in the indictment, with intent to deceive and defraud, the offense was made out. The payment may have been made in the expectation that it would further the original fraudulent design, by leading on the complainant to make other deposits, partly on the faith of the original representations.

We think, however, that the court erred in receiving evidence of the admissions of the defendant that his house and lot in Watertown were incumbered by mortgage. The existence of the incumbrance was a material fact for the prosecution to prove, and the best evidence was the mortgage itself, the record, or a certified copy of the record. Without accounting for the absence of these, secondary evidence was not admissible. Verbal admissions of the defendant were no higher evidence than parol testimony of the contents of the mortgage. It seems to be the rule in this State that the admissions of a party are competent evidence, only when parol evidence of the fact sought to be shown by such admissions would be competent. In *Welland Canal Company v. Hathaway* (18 Wend., 480), it was held that evidence resting in records cannot be supplied by proof of admission of the party sought to be affected by such evidence, of the existence of the facts appearing by such records. To the same effect are *Jenner v. Joliffe* (6 Johns., 9) and *Hasbrouck v. Weaver* (10 id., 246). The prosecuting attorney acknowledged the force of this rule and endeavored to comply with it by offering in evidence a certificate of the clerk of Jefferson county, tending to show the existence of a mortgage on defendant's house and lot in Watertown, but the certificate, not containing a copy of the whole of the mortgage, it was excluded. The district attorney then offered himself as a witness, and testified, under objection, that, in a certain conversation, the defendant said to him that he owned a house and lot in Watertown worth \$40,000, which was incumbered by a mortgage of \$20,000, given to trustees to secure bonds negotiated by the trustees. This, we think, was clearly inadmissible. Not only was it an attempt to prove a record by parol, but it did not profess to be evidence of the whole of the record, and so was subject to the very objection upon which the clerk's cer-

tificate had been excluded. Moreover, the admission shows that the mortgage was special in its character, and the question whether it constituted an incumbrance on the property involved an inquiry as to its legal effect, for which purpose parol evidence of admissions is never admissible.

We are also of the opinion that the testimony of the witness Sears, that the defendant said to him, in June, 1876, that he brought to Port Byron \$50,000 in currency for banking purposes, was improperly received. It was admitted, undoubtedly, upon the ground that it was competent for the prosecution to prove other like acts of fraud, at or about the same time, as evidence of the intent with which the alleged representations to the complainant were made. The rule is not questioned, but the testimony of Sears tended to establish no act. It did not appear that he was induced by the defendant's statements to do any thing, or that they were made for the purpose of inducing him to do any thing, or that any action whatever on his part was contemplated when the statements were made. In short, there is nothing in the testimony from which it can be inferred that the statements to Sears were made with a fraudulent intent, and consequently they do not throw light upon the *quo animo*.

For these reasons the conviction should be reversed, and a new trial ordered in the Court of Sessions of Cayuga, to which court the proceedings will be remitted.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

DAVID K. McCARTHY, RESPONDENT, v. REBA W.  
McCARTHY, APPELLANT.

*Provisional remedy—what is not, under Code of Civil Procedure, § 772.*

An order authorizing a substituted or constructive service of a summons is not an order granting a provisional remedy, within the meaning of section 772 of the Code of Civil Procedure.

APPEAL from an order denying a motion, made without notice, to vacate an order, made by a justice of the Supreme Court out of court, for a substituted service of the summons in this action. The order recites that the motion was denied upon the ground that the judge had not jurisdiction to hear it.

*A. C. Davis*, for the appellant.

*Hiscock, Gifford & Doheny*, for the respondent.

SMITH, J.:

The only question in this case is whether an order authorizing a substituted or constructive service of a summons is an order which grants a provisional remedy within the meaning of section 772 of the Code of Civil Procedure. That section, after directing generally in what locality, and by what judge, an order may be made out of court, without notice, concludes in these words: "When such an order grants a provisional remedy, it can be vacated only in the mode specially prescribed by law; in any other case it may be vacated or modified, without notice, by the judge who made it, or upon notice by him or by the court." The respondent's counsel contends that an order for substituted service is an order granting a provisional remedy, and that the mode specially prescribed for vacating or modifying such an order is to be found in section 669, which provides that a motion, upon notice, in the Supreme Court must (with some exceptions which do not affect the present question) be made within the judicial district in which the action is triable, or in a county adjoining that in which it is triable.

This, we think, is a misconception of the language of section 772. The section refers, as we construe it, to the provisional remedies, described as such, in the Code itself (chap. 8), and to the mode specially prescribed by the Code for vacating or modifying an order granting any of such provisional remedies. The provisional remedies treated of by the Code under that specific designation are: "Arrest," "Injunction," "Attachment of property," "Receivers" and "Deposit, delivery or conveyance of property." The mode in which an order granting either of the first three remedies may be vacated or modified is specifically pointed out by the Code. (Arrest, §§ 567, 568; Injunction, §§ 626 to 630; Attachment, §§ 682 to 696.) As to the others, no mode is specially provided, for the reason, probably, that those remedies can be granted only on notice, except that a motion without notice may be made for a receiver when the adverse party has failed to appear. (§§ 714, 717.) The "provisional remedies" provided for by the present Code are substantially the same as those defined by its predecessor, with the single exception that proceedings to replevy personal property are omitted from that class of remedies, and are treated of in a separate chapter, for the reason stated by Mr. Throop in his note at the head of chapter 7. Under the former Code, the term "provisional remedies" acquired a well-understood technical meaning, and we think that wherever the term is used in the new Code it is employed in the same general sense.

This construction is strengthened, we think, by section 416 of the present Code, which seems to indicate that the service of a summons, whether personal or constructive, was not regarded by the law makers as a provisional remedy. The section is: "A civil action is commenced by the service of a summons, but, from the time of the granting of a provisional remedy, the court acquires jurisdiction, and has control of all the subsequent proceedings. Nevertheless, jurisdiction so acquired is conditional, and liable to be divested in a case where the jurisdiction of the court is made dependent, by a special provision of law, upon some act to be done after the granting of the provisional remedy." Three modes of serving a summons are provided by the Code: Personal, substituted and by publication. Regular service in either mode gives the court complete and absolute jurisdiction. If service be made in

either of the two latter modes, the defendant may be let in to defend in certain circumstances which would debar him if the service were personal (§ 445); but the jurisdiction acquired is not conditional merely and liable to be divested, as in the case where it is acquired by the granting of a provisional remedy. The character of the latter jurisdiction is shown by the case of *Waffle v. Goble* (53 Barb., 517), referred to in the reviser's note to section 416 of the new Code.

The respondent's counsel contends that the term "provisional remedy" is to be understood in a much broader sense. Any provision, says the counsel, which affords a means other than the usual and general way to accomplish an end is a provisional remedy; or, as was said in the opinion of the learned judge who made the order appealed from, "as the order was made to meet a particular and pressing exigency which prevented the commencement of the action in the ordinary way, it was one which the law 'provided for the occasion,' and is, therefore, directly and literally within the meaning of the word 'provisional,' as defined by lexicographers." In that broad sense, the term would include every special order out of the usual course in the progress of an action. We are not prepared to adopt that construction.

We think the order for substituted service did not grant a provisional remedy within the meaning of the Code, and that the judge who granted it had jurisdiction to entertain a motion to vacate or modify it. (Code, § 772, last clause.) The merits of the motion are not before us on this appeal. We reverse the order and give the defendant leave to renew the motion to vacate, on notice to be served within ten days after entry by him of the order herein; or, if he does not enter the order, within ten days after the order shall be served upon him, the appellant to have ten dollars costs and disbursements of the appeal.

MULLIN, P. J., and TALCOTT, J., concurred.

Ordered accordingly.

RUSSEL B. BIDDLECOM, PLAINTIFF, v. PLINY NEWTON,  
AS SUPERVISOR OF THE TOWN OF ORLEANS, DEFENDANT.

*Proceedings for bonding towns — commissioners to issue bonds — annulling of proceedings — effect of, on powers of commissioners.*

On July 1, 1871, the county judge of Jefferson county, in proceedings instituted before him, under chapter 907 of 1869 and chapter 925 of 1871, appointed commissioners to issue bonds in aid of the construction of a railroad. The proceedings were removed by *certiorari* to this court, and on July 1, 1872, a judgment was entered affirming them. On February 24, 1873, the Court of Appeals reversed the judgment and directed the county judge to dismiss the application. After the issuing of the *certiorari*, the commissioners issued bonds to the amount of \$80,000 and delivered them to the plaintiff, the agent and treasurer of the railroad company, who delivered in exchange therefor the stock of the company. Both the plaintiff and the commissioners knew of the pendency of the *certiorari*. The money necessary to pay the interest on the bonds for a certain time had been levied and received by the collector. In this action brought to recover the amount of certain coupons attached to the bonds, the money to pay which had been collected, the plaintiff produced an instrument signed by the persons appointed commissioners, reciting their appointment, and the fact that the proceedings had been declared void, and transferring to plaintiff all their right to the bonds as commissioners or otherwise.

*Held*, that the money having been collected for the specific purpose of paying the coupons, that if it was the duty of the defendant to pay it over to the holders of the coupons, he could not set up the invalidity and reversal of the proceedings before the county judge as a reason for not doing so.

That it was, in fact, his duty to pay the commissioners, and not the holders of the coupons.

That the commissioners had no right to, or interest in the fund except as commissioners, and while continuing to hold the office, and that they could not transfer their official rights or divest themselves of their official duty.

That immediately upon the decision of the Court of Appeals, they ceased to be such commissioners and to have any interest whatever in the fund.

That nothing passed to the plaintiff by the pretended transfer, and that plaintiff could not recover.

*Semble*, that where exceptions are taken during the trial, the direction of a verdict, subject to the opinion of the court, is error; that the consent thereto is a waiver of the exceptions.

MOTION by plaintiff for judgment on a verdict, ordered in his favor at the Jefferson Circuit, subject to the opinion of the court at General Term.



*J. F. Starbuck*, for the plaintiff. By special act of the legislature, under which the defendant received the money, the defendant is put in the place of, and subjected to the same liabilities, as the collector. The defendant cannot question the validity of the bonds or the right of the plaintiff to the money. (*People ex rel. Martin v. Brown*, 55 N. Y., 182; *Murdock v. Aikin*, 29 Barb., 67; *Merritt v. Willard*, 4 Keyes, 208; *Ross v. Curtiss*, 31 N. Y., 606.) The money was collected by tax to pay a debt of the town to the plaintiff, and the plaintiff has the same right to it that he would have had, had it been collected by the sheriff upon an execution against the town after judgment in his favor. (*Murdock v. Aikin*, 29 Barb., 67; 25 How., 594; *People v. Bd. of Police*, 63 N. Y., 623; *Lawrence v. Fox*, 20 id., 268; *Schermerhorn v. Vanderheyden*, 1 Johns., 140; *Pratt v. Adams*, 7 Paige, 615; *Clark v. Ely*, 2 Sandf. Chy., 166; 11 Ves., 22; 1 Johns. Chy., 129; *Gould v. The Town of Sterling*, 23 N. Y., 439; *Ross v. Curtiss*, 31 id., 606.) The tax-payers who paid this money are the only parties who could question the legality of the act of the board in raising it. (*Bellinger v. Gray*, 51 N. Y., 610; *Union Nat. Bank v. Mayer and others*, 51 id., 638; *Bk. of Commonwealth v. Mayer*, 43 id., 184.) But the tax-payers having voluntarily paid the money, are precluded from questioning the legality of the act of raising the same. (*People v. Williams*, 3 N. Y. S. C. [T. & C.], 341.) The tax-payer could only attack the action of the board by bringing it up directly for review before the court. He could not permit the action of the board to stand unreversed and attack the action of the board of supervisors in a collateral proceeding or action. (*Mooers v. Smedley*, 6 Johns. Ch., 28; *Susquehanna Bk. v. Supervisors*, 25 N. Y., 312; *Mut. Benefit Life Ins. Co. v. Supervisors*, 3 Keyes, 182; *Haywood v. The City of Buffalo*, 10 N. Y., 5-34; *Hasbrook v. The Kingston Bd. of Health*, 3 Keyes, 480; *The People v. Suprs. of Westchester*, 57 Barb., 380; *Comins v. Bd. Suprs. of Jefferson County*, 13 Alb. Law Jour., 113; *Kilborn v. St. John*, 59 N. Y., 21; 19 Wallace, 187; 19 id., 655; *Guest v. Brooklyn*, 4 N. Y. Weekly Digest, 559.) The town has not returned the stock received in exchange for the bonds. (*Pendleton County v. Amy*, 13 Wall., 297; *Suprs. v. Schenck*, 5 id., 581; *Newton v. Keech*, 9 Hun, 361; *Town of Venice v. Woodruff*, 62 N. Y., 462.)

*L. H. Brown*, for the defendant.

SMITH, J. :

The order in this case, directing a verdict subject to the opinion of the court, was irregular. Exceptions were taken by each party to rulings admitting or excluding evidence. The defendant also excepted to the ruling of the court that there was no question of fact in the case, and to the refusal to submit to the jury the question whether the plaintiff was guilty of a fraud, in connection with the commissioners, in issuing the bonds, pending the *certiorari*. Irrespective of the merits of the exceptions, the order was erroneous. (*Cobb v. Cornish*, 16 N. Y., 602; *Purchase v. Matteson*, 25 id., 211; *Sackett v. Spencer*, 29 Barb., 180; *Bell v. Shibley*, 33 id., 610.)

Had both parties consented to such a disposition of the case at the time, their consent probably would have been an abandonment or waiver of the exceptions. (*Byrnes v. The City of Cohoes*, 67 N. Y., 204.) But there is no evidence of such consent on the part of the defendant; on the contrary, the case shows that his counsel excepted to the order by which the case was disposed of.

Upon the argument of this motion, however, the defendant makes no reference to the alleged irregularity, or to his exceptions, but he opposes the motion on the merits, contending that the court should order judgment in his favor upon the verdict. This, we think, is a waiver of the irregularity in the order, and of the exceptions taken by him, and the question is before us, which of the parties is entitled to judgment. (*Briggs v. Merrill*, 58 Barb., 389.)

The facts of the case, as we gather them from the evidence, are these: The plaintiff claims to be the holder and owner of certain interest coupons which were originally attached to and have been cut from certain instruments purporting to be bonds of the town of Orleans, issued in aid of the construction of a railroad, by commissioners appointed by the Jefferson county judge, in proceedings instituted before him, under chapter 907 of the Laws of 1869, and chapter 925 of the Laws of 1871. The plaintiff claims judgment for the sum of \$8,050, the amount due on said coupons, with interest from November 25, 1876, the day on which the verdict was rendered. The order appointing the commissioners was made July 1, 1871.

The proceedings before the county judge were removed into this court by a writ of *certiorari*, which was sued out in September or October, 1871, and the return to which was filed in December, 1871. On July 1, 1872, a judgment of this court was entered affirming the proceedings before the county judge. From that judgment an appeal was taken to the Court of Appeals, and on the 24th of February, 1873, the latter court reversed the judgment of this court, and the proceedings had before the county judge, on the ground that a majority of the tax-payers representing a majority of the taxable property, did not join in the application for bonding, and the county judge was directed to enter an order dismissing the application. (*People ex rel. Irwin v. Sawyer*, 52 N. Y., 296.) Subsequently to the removal of the record by *certiorari*, and while the writ was pending, to wit, on the 3d of April, 1872, the commissioners issued bonds of the town to the amount of \$80,000, and delivered them to the railroad company in exchange for the stock of the company, or script for stock, to the like amount. The company was represented in that transaction by the plaintiff, who was its treasurer, and who, as such, delivered the stock and received the bonds in behalf of the company. The bonds then issued are the same bonds to which the coupons in suit were attached. The commissioners and the plaintiff had notice of the pendency of the *certiorari* at the time. The stock or script has remained in the hands of the commissioners ever since, and nothing has been done by the town, or its officers, or agents, other than the commissioners, ratifying said transaction, or recognizing the validity of the bonds. On November 9, 1872, the commissioners reported to the board of supervisors that it was necessary to raise the sum of \$8,154.75 to pay the interest on said bonds falling due in August, 1872, and February and August, 1873, and the supervisors levied that sum upon the taxable property of the town, and directed it to be collected and paid to the commissioners for interest on said bonds. The only interest falling due on the bonds in the years 1872 and 1873, so far as appears, was that which matured on the coupons in suit. The tax was collected, and the collector, Keech, was restrained from paying the money to the commissioners by an injunction order which was granted on the application of the present defendant. Subsequently the complaint in the

action in which the injunction was ordered, was dismissed, after a trial of the action, and thus the order was vacated. It appears that an appeal was taken from the judgment dismissing the complaint, but what disposition was made of it, or whether it is still pending, is not shown. In the meantime the money remained in the hands of the collector, and he wished to pay it to the party entitled to it in extinction of his liability and in exoneration of his bail. The plaintiff claimed it for the purpose above stated, and the defendant claimed that it should be paid to him, as supervisor, to the general credit of the town. In this state of things the legislature, on 26th April, 1876, passed an act (Laws 1876, chap. 178) by which Keech was authorized and directed to pay said money to the supervisor of the town of Orleans, and the supervisor was to receive the same, and Keech and his bail were thereupon to be discharged. Section 4 made it the duty of the supervisor, on receipt of the money, to keep and apply it toward the extinguishment of the next tax assessed on the town of Orleans after the receipt of said money. Section 5 is in the following words: "Nothing in this act contained shall be so construed as in any manner to affect the right of the holder of any coupons cut from any bonds issued by said town for railroad purposes, to maintain an action against said town to recover the money intended to be secured by such bonds and represented by such coupons; and all the rights now by law existing in such holders to have such coupons paid out of the money mentioned in section 1 of this act shall continue in full force against said town. The supervisor of the town of Orleans by accepting the money mentioned in the first section of this act shall be deemed thereby to have assumed and accepted all the liabilities in regard thereto, that existed against the said John Keech before the passage of this act, and any and all remedies that might have been enforced against the said John Keech shall thereafter exist against the said supervisor and may be enforced against him."

The obvious purpose of this legislation was to relieve the collector and his bail from liability on his paying the money to the supervisor, without affecting the rights of the holders of the coupons therein mentioned. To that end the supervisor, on receiving the money, was put in the place of the collector, and was subjected to all the liabilities and remedies existing against the collector in favor of

the holder of the coupons. The provision of the fourth section that the supervisor should apply the money to the extinguishment of the next tax assessed on the town is not inconsistent with this construction. If the money should be so applied the only consequence would be that upon a recovery against the supervisor by a holder of the coupons, pursuant to section 5, the supervisor would be required to pay the amount out of any moneys in his hands belonging to the town not specially appropriated, or if not paid the amount could be collected of the town according to the provisions of the general statutes. (2 R. S., 475, §§ 106, 102, 103.)

What remedy, then, had the plaintiff against the collector? Could he have maintained an action against him for the amount of the coupons? Assuming that it was the duty of the collector to pay to the holder of the coupons, we think the plaintiff's counsel is correct in his position that the collector could not have set up the invalidity and reversal of the proceedings before the county judge as a reason why he should not pay over the money levied and collected for the specific purpose of paying the coupons. He could not question the legality of the bonds, and would have no discretion in that respect. (*Ross v. Curtiss*, 31 N. Y., 606; *People v. Brown*, 55 id., 180, 187; *People v. The Board of Police, etc.*, 63 id., 623; *First National Bank of Oxford v. Wheeler*, 17 Alb. L. J., 154; S. C., 6 N. Y. W. Dig., 28.)

But the duty of the collector was to pay to the commissioners and not to the holder of the coupons. His warrant directed him to pay to the commissioners or their successors in office. For the purpose of obviating the difficulty growing out of this consideration the plaintiff produced in evidence an instrument in writing, executed by the persons who were appointed commissioners, reciting their appointment in the proceedings before the county judge, and the fact that said proceedings had been declared void and dismissed and purporting to transfer to the plaintiff all their right to the fund, as commissioners or otherwise. It seems to us the attempted transfer was a nullity. Assuming that the parties executing it were commissioners by valid appointment they had no right to, or interest in the fund, except as such commissioners, and while continuing to hold the office they could not transfer their official rights in respect to the fund or divest themselves of their official duty to receive it

and dispose of it as directed by law. Much less could they impose upon the collector a duty to pay the money to any person other than those directed in his warrant. But they were not duly appointed commissioners. It was a necessary consequence of the adjudication of the Court of Appeals that there were no such officers and there was no such office. At the time of the execution of the proposed transfer, therefore, the parties executing it were not authorized to act as commissioners, and as they had no interest in the fund as individuals the assumed transfer passed nothing and was void. In *Ross v. Curtis*, and the other cases above cited in connection with it, there was a breach of duty on the part of the supervisor, or other officer, to pay over as required by law, and, besides, there had been no adjudication declaring void the bonds or other demands, in payment of which the money was to be applied. The resort to the assumed transfer is an attempt to do indirectly what could not be done directly. The parties executing it could not have maintained an action, or a proceeding by *mandamus*, to compel the collector to pay over to them, except upon the assumption that they were commissioners, an assumption which the judgment of the court did not permit.

It results from these views that the plaintiff has no cause of action against the defendant; and in this there is no hardship as he was not only instrumental in procuring the bonds to be issued, but at that time, and when he invested his money in the coupons in suit, he had notice that the *certiorari* was pending.

Judgment of nonsuit should be ordered.

MULLIN, P. J., and TALCOTT, J., concurred.

Judgment of nonsuit ordered.

JOHN HOFFMAN, ADMINISTRATOR OF MARGARET HOFFMAN, DECEASED, APPELLANT, v. THE NEW YORK CENTRAL AND HUDSON RIVER RAILROAD COMPANY, RESPONDENT.

*Contributory negligence—when a question for the jury.*

This action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. At Amboy the defendant had four tracks, numbered from the south 1, 2, 3 and 4; 1 and 2 being for passenger, and 3 and 4 for freight cars. Upon land adjoining the southerly tracks owned by the defendant, it had erected a station and a plank sidewalk, leading westerly about 100 feet to a highway. At the time of the accident the plank-walk was so obstructed with snow as to be impassable. East of the highway cattle guards had been constructed, the southerly two being planked over and the northerly two left open, but the two latter were, at the time of the accident, so filled and covered over with snow, as to be entirely concealed.

The plaintiff's intestate who lived on the aforesaid highway, a few rods northerly from the crossing, arrived at Amboy in the morning with two children, one about three years old and the other an infant, and was assisted from the cars on the southerly side of track No. 2; she started to walk westerly and diagonally across the tracks toward the highway, the shortest route to her house; a gravel train was approaching on track No. 3; after she had walked about fifty feet she fell into the cattle guard which was concealed by the snow, and before she could extricate herself she was run over by the gravel train and killed. If she had not so fallen she would have had time enough to cross the track before the train would have reached that point. The justice at the Circuit granted a nonsuit. *Held*, that this was error and that the case should have been submitted to the jury.

APPEAL from a judgment in favor of the defendant for costs, after a nonsuit directed at the Circuit.

*Isaac F. Garfield*, for the appellant. The deceased was a passenger on the defendant's railroad, and it (the defendant) was under an obligation to provide for her an easy and safe mode of egress from its station to the nearest street, and until it did so, its liability as a carrier of passengers did not terminate. (*Dillaye v. New York Central Railroad Company*, 56 Barb., 30 and 38; *Hulbert v. New York Central Railroad Company*, 40 N. Y., 145; see pp. 150, 151 and 152; 97 Mass., 275, p. 278.) The rule that the defendant owed a legal duty to the deceased, she being a passenger,

although injured upon defendant's land, is laid down in *Nicholson v. Erie R. R. Co.* (41 N. Y., 533; opinion by EARL, Ch. J.). The deceased had ample time to have crossed had she not fallen into the guard, and under such circumstances negligence cannot be predicated upon her attempt to cross the track. (*Aaron v. Second Ave. R. R. Co.*, 2 Daly, 127; *Baxter v. Same*, 3 Robt., 570; *Mentz v. Same*, 3 Abb. Ct. App. Dec., 274; affirming, 2 Robt., 356.)

*G. N. Kennedy*, for the respondent. There was no question for the jury. The conduct of the plaintiff in running as she did, incumbered with her children and bag, directly across defendant's tracks, and in front of an approaching train, was an act of contributory negligence. (*Belton v. Baxter et al.*, 54 N. Y., 245; *Barker v. Savage*, 45 id., 193; *Filer v. N. Y. Central R. R. Co.*, 49 id., 51; *Wilcox, Admr., etc. v. Rome and Watertown R. R.*, 39 id., 358.) The attempt to cross in front of an approaching train is recklessness. (*Gonzales v. N. Y. and Harlem R. R. Co.*, 38 N. Y., 443; *Warner v. N. Y. C. R. R.*, 44 id., 466.) The facts in this case being uncontradicted, the question of negligence is one of law for the court. (Same case, p. 442; *Mitchel, Admr., v. N. Y. Central and H. R. R. R. Co.*, 64 N. Y., 655; *Kenyon v. N. Y. C. and H. R. R. Co.*, 12 Supreme Court Rep., 481.)

TALCOTT, J. :

This is an appeal from a judgment rendered in favor of the defendant for costs, on a nonsuit ordered at the Onondaga Circuit.

The action is to recover damages for the alleged negligence of the defendant, whereby it is claimed that the plaintiff's intestate was killed on the morning of the 16th of December, 1875. The plaintiff on that morning was a passenger on one of the trains of the defendant from Syracuse to Amboy station, near which latter place she resided, and which is a small way station on the defendant's road a few miles west of Syracuse. At Amboy station the defendants have four tracks numbered, respectively, from the south, 1, 2, 3 and 4. The two southerly tracks are used for passenger cars and the two northerly for freight cars. The defendant had erected a small station at this place which was upon their land on the south-



erly side of the tracks, and about 100 feet easterly from a point where the tracks of the defendant crossed a highway. In order to afford proper access for foot passengers to and from the station-house to the highway, the defendant had constructed on their own land, and westerly from the station along the southerly side of the four tracks, a plank sidewalk. But there had been several falls of snow at the place, and although it was a bright and clear morning when the deceased arrived at the station, a light snow of some few inches in depth had fallen the night before. The snow had so drifted in upon the plank sidewalk and been, by the employes of the defendant, shoveled from the tracks on to the plank-walk, that the latter was obstructed and rendered, according to some of the witnesses, impassable for foot passengers, so that the sole means of egress from the station to the highway, was by walking over the space occupied by the tracks. On the easterly side of the highway the defendants had constructed near the line of the highway, perhaps partly in the highway, cattle guards under each of its four tracks. The two southerly of these cattle guards were, however, planked over, so that they could be passed over both by passengers and animals. The two northerly cattle guards were, however, left open under the freight tracks, but at the time of the accident, resulting in the death of the intestate, they were filled with snow, and by the snow fall of the night before so covered up and concealed, that there was nothing to disclose to the passer-by that the cattle guards existed.

The intestate arrived at Amboy station about eight o'clock in the morning. Her house was on the highway a few rods from the railway crossing; she arrived, as before stated, with her two children, one about three years old and the other an infant in arms; she was assisted out of the car on the southerly side of track No. 2, on which she came, and after waiting for the cars to pass on westerly by reason of the plank sidewalk being obstructed, as aforesaid, she undertook to cross the four tracks diagonally, the shortest route to her home, which was north of the railroad crossing. At this time there was a gravel train upon track No. 3, the track next north of the one upon which the intestate had arrived at the station, and taking her infant in her arms and a small satchel in her hand and leading the other child by her other hand, she pursued the route indicated for the distance of about forty-five feet, when she fell into the

cattle guard under track No. 3, and before she could recover herself was run over by the gravel train and instantly killed. The engineer of the gravel train blew the whistle as a signal to alarm persons who might wish or attempt to cross the track, but at what distance from the highway crossing did not clearly appear. At any rate the deceased probably saw the gravel train approaching and kept on in her course, having, as the court assumed, sufficient time to cross track No. 3, on which the gravel train was advancing, had she not fallen into the cattle guard.

It was held in *Dillaye v. The New York Central Railroad Company* (56 Barb., 30), MULLIN, J., delivering the opinion of the court, that a railway company owes to its passengers the duty of providing a safe and easy mode of egress from its station to the nearest highway. This was held in a case in which the passenger injured, was riding upon a freight train. The decision was reversed in the Court of Appeals (see 2 Alb. Law Journal, 356), without, however, questioning that the duty indicated by the Supreme Court was applicable in the case of a passenger upon a regular passenger train, the court holding that the receipt of fare from such passengers as succeed in getting on a freight train cannot be considered as a general invitation to the public to ride in that way at their pleasure.

Here, the proper pathway was obstructed so as to be rendered, in some sense, impassable, and there was no other mode of egress from the defendant's station, except along or across its track. (*Hulbert v. The N. Y. Central, etc.*, 40 N. Y., 145.) The question then arises whether, supposing the deceased to have seen the gravel train, perhaps before she actually reached the third track, and there being, apparently, sufficient time to have allowed her to cross the third track in safety, was it her duty to have instantly stopped, and was her omission to do so such clear evidence of negligence on her part that her administrator cannot recover even though she fell into the cattle guard and was thus prevented from crossing? On this subject we are referred, by the counsel for the respondent, to the case of *Belton v. Baxter* (54 N. Y., 245), in which a judgment for the plaintiff was reversed by the Commission of Appeals, upon the principle that it is negligence *per se* for a foot passenger to attempt to cross a public thoroughfare, upon a nice calculation of chances of injury, and that, if in such case, the attempt be made

and the calculations fail, to the plaintiff's harm, he can have no redress for injuries received in his mistaken effort. But the case of *Belton v. Baxter and others*, was again tried and in process of time, came again on appeal before the Court of Appeals proper, and is reported in 58 New York, 411, where that court, upon a slight difference in the verbiage of the evidence, reversed a judgment of non-suit which had been rendered upon the second trial. ALLEN, J., delivering the opinion, says: "Upon the whole evidence before us, it is not conclusively shown or necessarily to be inferred that the plaintiff knew or had reason to believe, at the time of his attempt to cross the avenue, that the cart, instead of following the car, had turned off and was passing it. \* \* \* If such was the fact, it was not sworn to by the plaintiff; neither is it a necessary inference. \* \* \* If the fact is to be inferred from the evidence, it must be drawn by a jury and not by the court. \* \* \* If the evidence is conflicting, is capable of different interpretations, or the inferences to be drawn from it are doubtful, it is the province of the jury to pass upon it. \* \* \* Whether it was prudent or imprudent for the plaintiff to attempt to cross the avenue under all the circumstances will be for the jury to determine. \* \* \* It was error to non-suit the plaintiff on that ground."

So here, there was some evidence, so that the court at one time assumed, that if the deceased had not fallen she would have had ample time to have got across. See *Mentz v. Second Avenue R. R. Co.* (3 Abbott's Court of Appeals Decisions, 274), where it was held that the rule requiring care and diligence on the part of the plaintiff, does not require him to anticipate the possibility of an accidental fall at an ordinary crossing:

In this case the leaving of the plank sidewalk in such a condition as that passengers from the station to the highway, were obliged to take the defendant's tracks, and then suffering the snow to accumulate in an open cattle guard, so that there was nothing discernible upon the surface to indicate the existence of a cattle guard or any other hindrance to a safe and expeditious crossing operated as a mere trap. It is said that the deceased lived near the neighborhood of these cattle guards, and had, several times before, traveled on the railroad to and from Syracuse, and that consequently she must be presumed to have known all about the cattle guards. It does not appear that she had

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been there before when the guards were filled with snow, or when they were not readily observable, and she could scarcely be expected by a mere effort of memory, to be able to fix the exact location of the cattle guard into which she fell. That she did not, seems obvious, and we think that, under the circumstances of this case, it should be left to the jury to say whether the deceased would have had sufficient time to have crossed track No. 3 in safety, notwithstanding the approach of the gravel train, had it not been for the concealed cattle guard, left so by the negligence of the defendant, and into which she fell while making the attempt to cross. The nonsuit, we think, was erroneous for the reasons stated.

Judgment reversed and new trial ordered, costs to abide the event.

Present — MULLIN, P. J., TALLOTT and SMITH, JJ.

Ordered accordingly.

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SAMUEL V. MILLER, APPELLANT, v. ARTHUR O'KAIN,  
RESPONDENT.

*Bankruptcy act — when proceedings are determined — Rights of surety of bankrupt.*

Under the provisions of the bankrupt act prohibiting any creditor who has proved his debt or claim from maintaining any suit at law or in equity thereupon against the bankrupt, unless a "discharge has been refused or the proceedings have been determined without a discharge," the proceedings are not determined unless an order to that effect has been entered by the United States Court.

If a creditor has proved his claim against the bankrupt, a surety for the bankrupt, who, after such proof thereof, pays the debt, occupies the position of the original creditor as to the enforcement of the claim by suit.

APPEAL from a judgment in favor of the defendant, entered upon a nonsuit directed by the court. The action has already been before the General Term, its decision being reported in 5 Hun, 39.

*Ralph T. Wood*, for the appellant.

*Charles S. Baker*, for the respondent.

TALOOTT, J. :

This is an appeal from a judgment rendered for the defendant for costs in an action brought on a promissory note for \$115, given by the defendant to the plaintiff, and also for moneys paid by the plaintiff on account of a note which he had signed as surety for the defendant and at his request. The note to the plaintiff fell due in April, 1871. The note paid by the plaintiff which he had signed as a surety for defendant fell due in November, 1866. The cause was tried by the court without a jury. On the 7th of February, 1872, the defendant was adjudged a bankrupt in proceedings regularly instituted in the District Court of the United States for the northern district of New York. On the first day of March, 1872, the plaintiff, as a creditor of the defendant and bankrupt, duly proved in bankruptcy his note, described in the first count of the complaint; and on the 14th day of March, 1872, Isaac Hewitt, then the holder and owner of the note which the plaintiff had signed as surety for the said defendant bankrupt, duly proved in bankruptcy the note described in the second count of the said complaint. The plaintiff, as such surety, after such proof, paid to the said Hewitt the whole amount of the note which he (the plaintiff) had so signed as surety, and the said note was by the said Hewitt delivered to the said plaintiff. Afterwards, and on or about the 18th of February, 1873, the register in bankruptcy declared a dividend to the creditors of the bankrupt, who had proved their claims, out of the assets which had come to the hands of the assignee, as such assignee in bankruptcy of the defendant, which dividend amounted to the sum of fifteen dollars and thirty cents on the note described in the first count of the complaint and held by the plaintiff, and to the sum of sixty-five dollars and fifty-three cents on the amount of the debt arising on the note which had been signed by the plaintiff as surety and which had been proved in bankruptcy by Hewitt. Both of these amounts were duly paid by the assignee to the plaintiff, and were accepted by him as applicable to the debts on which they were declared.

After the payment of said dividends, and before the commencement of this action, the assignee in bankruptcy rendered his accounts as such to the register, and was by him duly discharged. After such discharge and accounting no further proceedings have

been had in the bankruptcy case by or in behalf of the bankrupt or any creditor. The court, at the Circuit, held as conclusions of law that by proving in bankruptcy the note described in the first count of the complaint, the plaintiff is deemed to have waived all right of action and suit thereon until such time as the proceedings in bankruptcy are determined; and that the said Hewitt, by proving the said debt on the note which the plaintiff had signed as a surety for the defendant, had waived all right of action thereon in like manner; and that the said plaintiff, by the payment of said amount to Hewitt, and the receipt and acceptance from the assignee in bankruptcy of the dividend thereon, elected to stand in the place of Hewitt, and was also prevented from maintaining a suit for the money paid by him or upon the said note until the determination of such proceedings in bankruptcy; that at the time of the commencement of this suit and the trial of the action, the proceedings in bankruptcy commenced by the said defendant were not fully determined, and as a necessary conclusion from the foregoing premises rendered a judgment for the defendant for costs as to both said causes of action.

By the bankrupt act, as it was originally passed, it was enacted "that no creditor proving his debt or claim shall be allowed to maintain any suit at law or in equity therefor against the bankrupt, but shall be deemed to have waived all right of action against him, and all proceedings already commenced or unsatisfied judgments already obtained thereon against the bankrupt shall be deemed to be discharged and surrendered thereby." (U. S. Rev. Stat., 5105.) This was amended by act of congress June 22, 1874, by providing as follows: "But a creditor proving his debt or claim shall not be deemed to have waived his right of action or suit against the bankrupt where the discharge has been refused or the proceedings have been determined without a discharge. (18 U. S. Stat. at Large, 179, § 7.)

No discharge has been refused to the bankrupt, and the Special Term held that the proceedings in bankruptcy had not been determined without a discharge. There was some conflict of opinion in the United States courts whether the right on the part of the bankrupt to apply for a discharge from his debts under the act was limited to one year by section 29 of the original bankrupt act, or

whether the limitation of one year was only applicable to cases where no debts had been proved and no assets had come to the hands of the assignee. (See *Wood v. Hazen*, 10 Hun, 362.)

But in *Wood v. Hazen* this General Term held, following the rules of Mr. Justice BLATCHFORD and Judge NELSON, made in the Circuit Court of the United States (and which are the same cases relied upon by the judge at Circuit in this case) that the limitation of one year, within which the bankrupt might apply for a discharge, did not apply to those cases in which debts had been proved against the bankrupt and assets had come to the hands of his assignee; that there was no statutory limitation upon the right to apply for a discharge in cases of the latter description, and that the proceedings in bankruptcy could not be considered as determined under section 5105, as amended by the act of June 22, 1874 (*supra*), and that the right of a creditor who had proved his debt in bankruptcy was suspended indefinitely, until some order of the court in bankruptcy had been made declaring the proceedings to be determined.

It seems that the judge of the southern district, with a view, probably, to meet this difficulty, had made a rule declaring that "a cause in bankruptcy is not to be deemed finally disposed of until an order is entered in the District Court declaring its termination," which order is to be made on motion to the bankrupt; but no such rule, as we are advised, exists in the northern district. And as to proceedings in bankruptcy in the northern district of New York, we suppose a special order in each case would be necessary in order to bring the proceedings in bankruptcy to a close, so that the suspension of a right to sue, which results from the proof of the debt in bankruptcy, while the creditor is desirous of using the same as a cause of action, may be brought to an end. This probably should be on notice to the bankrupt, as is provided by the rule in the southern district; and on that motion both the bankrupt and the creditor can be heard.

In regard to the claim founded on the money paid to discharge the debt on which the plaintiff was a surety, the plaintiff claims that that debt was not proved by him, and consequently that as to that, there is no suspension of a right of action. But such debt was provable under the bankruptcy, as is conceded, and the discharge, if granted, will operate to release the bankrupt from the same,

though the payment by the plaintiff was after the decree in bankruptcy. The section 5070 of the Revised Statutes provides that "any person liable as bail, surety, guaranty or otherwise for the bankrupt, who shall have paid the debt or any part thereof in discharge of the whole, shall be entitled to prove such debt, or to stand in the place of the creditor if the creditor has proved the same, although such payments shall have been made after the proceedings in bankruptcy were commenced." This seems accurately to describe the position of the plaintiff as to the claim described in the second count of the complaint, and we interpret the section to mean that if the creditor has proved the debt against the bankrupt, the surety who shall have paid the debt after that time is, by force of the statute, subrogated to the position of the original creditor as to the proof, the dividends and the claim or debt. The plaintiff received the dividend, which he could not have done unless the debt had been proved in bankruptcy. He cannot be permitted to avail himself of the proof of the debt for the purpose of receiving the dividends and repudiate it so far as it operates to create a suspension of his right to sue on the demand. On the whole case, we think the judgment rendered at the Circuit is correct.

Judgment affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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MARGARET T. O'GRADY, APPELLANT, v. JOHN S. COE, AS  
EXECUTOR, ETC., OF THOMAS O'GRADY, DECEASED, IMPLEADED  
WITH OTHERS, RESPONDENT.

*Purchase by agent of demand against principal — upon what terms Court of Equity will set it aside.*

Thomas O'Grady and wife executed a bond and mortgage to one W., who thereafter assigned the same to a son of the said Thomas, who assigned it to one Doyle, who assigned it to the son's wife, the plaintiff herein. The last two assignments were without consideration. At the time of the purchase of the mortgage by the son, he was acting as confidential agent of his father. In an action to foreclose the mortgage, the referee held that the confidential rela-



tions existing between the father and son prevented the latter from purchasing the mortgage, and that the assignment to him was void.

*Held*, that this was error; that at law the assignment vested the legal title in the son, and that equity would not allow the title so acquired to be taken from his assignee except upon the payment of the amount expended in purchasing the same.

APPEAL from a judgment entered on the report of a referee, dismissing plaintiff's complaint.

*John Callister*, for the appellant.

*D. Herron*, for the respondent.

TALCOTT, J. :

This is an appeal from a judgment entered on the report of a referee, dismissing the plaintiff's complaint.

The action was in the ordinary form to foreclose a mortgage. Certain infants appeared by their *guardian ad litem*, who put in the usual general answer in behalf of the infants.

Thomas O'Grady put in an answer setting up, in substance, that the mortgage was made for the benefit and accommodation of his son, Michael O'Grady, who had the money and agreed to pay the mortgage. The mortgage was made by Thomas O'Grady and Margaret, his wife, to the executors of Jared Wilson. Margaret has since died intestate and was seized of the mortgaged premises at her death. After her death Michael O'Grady, the son, took an assignment of the mortgage from the executors of Wilson, paying the full face thereof. After about a year he assigned the mortgage to Thomas Doyle, who, on the same day, assigned it to the plaintiff, then the wife of Michael. There was no consideration passing between Michael and Doyle or Doyle and the plaintiff, but the assignment to Doyle was for the purpose of having him assign the same to the wife of Michael. Michael has since died.

The referee has found the issues presented by the answer of Thomas O'Grady in the negative, and that the proceeds of the bond and mortgage were obtained and used for the benefit of Thomas O'Grady. But he finds that in the transaction of negotiating the mortgage, and in other matters in assisting his father to get into

business and taking some charge of his business, Michael was acting for, and was the agent of, Thomas O'Grady, and by reason of such relation had no right to purchase the said bond and mortgage in his own name and for his own benefit, though he expressly finds that Michael purchased the same with his own money, and that his father, the said Thomas O'Grady, was at the time indebted to Michael in a considerable amount. He finds as a conclusion of law upon the foregoing facts that Michael, being the agent of Thomas, could not legally take and hold the bond and mortgage for himself, and that his assignee, Doyle, got no right or title to the bond and mortgage, and could not legally assign the same to the plaintiff, who has consequently no title to the bond and mortgage, and he therefore directs a judgment dismissing the complaint with costs.

It will be observed that Thomas O'Grady sets up no such defense, and does not seek to question the right of Michael to purchase and hold the bond and mortgage in his own name on the ground of the supposed relation of Michael to him as agent. But conceding that the general answer of the infants is sufficient to enable their defense to be made if it existed, we think the referee has entirely misconceived the law growing out of the fiduciary relations of principal and agent. The proper forms having been observed, the assignment of the bond and mortgage to Michael was good at law; the title passed. In any case the assignment to him was not *void* but *voidable* in equity, at the election and upon the option of the supposed principal. There is a rule of equity which prohibits parties from taking advantage of a fiduciary relation to make profit to themselves, to the injury of the persons to whom they stand in such relation, provided such parties apply in season and seek to set aside the transaction or to claim the benefit of the advantage which the person who has violated his duty growing out of the relation has acquired. It is a rule of equity and not of law, and if an agent purchases property in violation of his fiduciary obligations, such purchase, though it may be avoided by his principal in a court of equity, yet is not void; and equity requires if a party claiming to be the equitable *cestui que trust* seeks to repudiate the transaction, that he shall do equity by refunding the money which the agent has expended in making the purchase. (*Harrington v. Brown*, 5 Pick., 519; *N. Y. Cent. Ins. Co. v. The Nat. Protection Ins. Co.*, 20 Barb., 468.)

A party holding a fiduciary relation which prevents him from purchasing on his own account, will not be permitted as against his *cestui que trust* to make a profit on such a purchase, but will be held to account on the basis of the sum actually paid by him; and the property purchased will, at the option of the *cestui que trust*, be decreed to the latter, subject, however, to whatever amount the trustee has advanced out of his own funds in the purchase. (*Van Epps v. Van Epps*, 9 Paige, 237; *Reed v. Warner*, 5 id., 650; *Smith, Recr., etc., v. Lansing*, 22 N. Y., 520.)

We think that in this case, even conceding Michael to have been such an agent of his father, Thomas O'Grady, as that he could not in equity have purchased and held the bond and mortgage in question in his own name and for his own benefit, yet that the purchase was good at law and the assignment valid for the amount which Michael advanced, and he was entitled to hold and enforce it for that amount, and that the referee has wholly mistaken the consequences of the act of purchasing the bond and mortgage in Michael's own name and on his own account. Such title as Michael got by the assignment from the executors of Wilson he could transfer to Doyle, whether with or without consideration, no creditors intervening, and Doyle could transfer to the plaintiff in the same way. There would be no equity in holding that the land was discharged of the mortgage without any payment, and the plaintiff is entitled to hold and enforce the mortgage for the amount which Michael O'Grady paid to acquire title to the same, even if he stood in such a relation to the mortgagors that he was incapable of making any profit to himself by the transaction. We think, therefore, that the conclusion of the referee dismissing the complaint was erroneous.

The judgment is reversed and a new trial ordered before another referee, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial ordered before another referee, costs to abide the event.

JOHN MOSHER, PLAINTIFF, v. PLATT CARPENTER,  
DEFENDANT.

*Forgery of negotiable paper — when person signing it is estopped from denying its genuineness.*

In 1874 a promissory note made by one George W. Carpenter, a son of the defendant, and indorsed by the latter, was transferred to one McKee, who stated to the defendant that he had transferred it to one Hamlin, and that Hamlin said he wished defendant had signed it on its face. Subsequently Hamlin saw the defendant, and the latter having agreed to sign the note on the face, Hamlin produced the note, now in suit, and defendant signed it as surety. Subsequently the note was transferred to other persons and purchased by the plaintiff before maturity, and in good faith. Upon the trial of this action, brought upon the note, it appeared that the note signed by defendant was not the note originally indorsed by him, but was a copy thereof, upon which the signatures and indorsements had been forged by McKee. Defendant interposes this as a defense, alleging that at the time of signing his name at Hamlin's request, he made no examination of the note, because the face looked just like the one he had signed, and he supposed it was the same.

*Held*, that the defendant having had full opportunity to examine the note as to its character and genuineness, and having failed so to do, preferring to rely upon the statements of McKee and Hamlin, he could not interpose such a defense in an action by one who purchased the same in good faith before maturity.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict directed for the defendant.

*Wm. H. Smith*, for plaintiff.

*Henry R. Selden*, for defendant.

TALCOTT, J. :

This is a motion for a new trial by the plaintiff, after a verdict for the defendant at the Ontario Circuit, the exceptions being ordered to be heard at the General Term in the first instance.

The action is brought upon a promissory note, signed by the defendant as surety for one George or George W. Carpenter, deceased, who was the son of the defendant, Platt Carpenter. The signature was made under the following circumstances : George W.

Carpenter had made a note for some indebtedness to one James McKee for \$750. The note, as it appeared on the trial, was payable to James McKee or bearer, purported to be signed George Carpenter, Platt Carpenter, surety, and to be indorsed Platt Carpenter, H. W. Hamlin and F. H. Hamlin, and also with a guaranty of collection by James McKee.

The following facts appeared in evidence: George or George W. Carpenter, had made such a note to McKee in September, 1874, which the defendant had indorsed, and which, McKee informed the defendant, he was going to negotiate to H. W. Hamlin. McKee afterwards informed the defendant that he (McKee) had seen Hamlin, and that Hamlin said he wished the defendant had signed it on the face, and that the way the defendant came to undersign the note as surety, was as follows: The defendant saw Hamlin at East Bloomfield after the note in suit had been passed by McKee to Hamlin, and the defendant then told him that McKee said he wished the defendant had signed the note on the face, and that he (the defendant) would as soon sign it on the face as on the back. The two then went to the house of Hamlin, when Hamlin produced the note and a pen and ink and the defendant signed the note on the face as it appeared on the trial. The defendant testified that he did not make any examination of the note at the time, "because the face looked just like the one he had signed, and he supposed it was the same." This note in Hamlin's possession must be assumed, from the verdict of the jury, to have been a forgery, both as to the signature of George Carpenter and the indorsement of defendant, and evidence was given upon the trial which warranted the jury in coming to the conclusion, that McKee had used the genuine note to fabricate several others which he had negotiated to different persons, and of which forgeries the note in suit was one, and had then absconded.

The defendant testified in his own behalf that the note in question was not the one he had indorsed. That he knew his son's handwriting. That his son signed his name George W. Carpenter, and defendant never saw him sign his name without the middle letter. That the signature on the back of the note was not his (the defendant's) genuine signature, and proceeded to point out several marks by which his genuine signature was distinguishable from the signature on the back of the note in suit. H. W. Hamlin transferred

the note without consideration as a gift to his son, F. H. Hamlin, who indorsed and transferred it to the plaintiff for a full consideration, who received it before maturity, and in good faith. The jury must be taken to have found under the charge of the court, that the defendant was guilty of no negligence when he signed the note as surety after it had been transferred to Hamlin, and there was no evidence that either of the Hamlins had notice, while they held the note, but what it was, in all respects, a genuine note.

The question then arises whether, under such circumstances, a *bona fide* holder for a valuable consideration, to whom the note was negotiated before maturity, can recover on it.

The defendant, by indorsing a note, impliedly contracts that it was, in truth, made by the party by whom it purports to have been executed, and cannot deny the fact when sued on his indorsement. (*Dalrymple v. Hillenbrand*, 62 N. Y., 5.) But when the holder procures the indorsement of a forged note, with a knowledge of the forgery and upon a representation to the indorser that it is genuine, he cannot enforce it against the indorser, nor can a person who receives such a note after maturity or without consideration. (*Turner v. Keller*, 66 N. Y., 66.)

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The warranty of genuineness applies to a person who signs the face of a note as a surety as well as to the indorser. His own signature is an implied assertion of the genuineness of those signatures which precede his upon the paper. (*York Co. M. F. Ins. Co. v. Brooks et al.*, 51 Maine, 506; *Chase v. Hathorn*, 61 id. 505; *Selser v. Brophs*, 3 Ohio St. R., 302.)

Although the jury must be taken to have found that the defendant was guilty of no negligence when he signed the note as surety, after it came into the possession of the elder Hamlin, we do not think there was any evidence upon which the jury was justified in that conclusion. In the case of *Whitney v. Snyder* (2 Lansing, 477), decided in this department, the defendant, whose signature to a promissory note was obtained without his knowledge, could not read and was obliged to trust to the representations of the other party as to the nature and character of the instrument signed by him, but that case fully concedes that where the party sought to be charged, has knowingly signed and put in circulation an instrument known by him to be a negotiable security, he is bound to know that he is fur-

nishing the means whereby third parties may be deceived and innocently led to part with their property on the face of his signature, and in ignorance of the true state of the facts.

Since the case of *Whitney v. Snyder*, that case, with some others, has been noticed by the Court of Appeals in the case of *Chapman v. Rose* (56 N. Y., 137), in which that court lays down the following rule: "Where one having the power to ascertain with certainty the exact obligation he is assuming, yet chooses to rely upon the statement of the person with whom he is dealing, and executes a negotiable instrument without reading or examination, as against a *bona fide* holder for value, he is bound by his act, and is estopped from claiming that he intended to sign an entirely different obligation, and that the statements upon which he relied were false. To avoid liability he must show that he was guilty of no laches or negligence in signing," and the opinion goes upon the ground that there does not appear to have been any physical obstacle to the defendant reading the paper before he signed it; and alluding to the case of *Whitney v. Snyder*, Judge JOHNSON remarks that in that case the defendant was unable to read, which seems to have presented the physical obstacle which would, under some circumstances, excuse a party whose signature has been obtained without his knowledge to a negotiable security.

There was no obstacle of that nature here. The defendant could read, and borrowed a pair of spectacles on the occasion to examine the note which was presented to him. He signed his name directly under that of his son, whose pretended signature on the note omitted the middle capital letter, although the defendant says he had never seen his son write his name without the middle letter, and he was upon the trial able to point out several discrepancies between his son's genuine signature and the signature on the face of the note, and his own genuine signature and the indorsement on the note in question. Under these circumstances we think the defendant was bound to know whether or not the note was a genuine note, and that he cannot defend upon the ground that he was ignorant of the character of the paper he signed, or that he chose to rely upon the representations, if any, of the party with whom he was dealing, or the statement of McKee that he intended to let Hamlin have the genuine note, but that he placed his name on a negotiable instru-

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ment, well knowing or having full opportunity to ascertain its character, and that, therefore, he is liable to a *bona fide* holder for value and before maturity. When the plaintiff had shown himself to be a holder for value and before maturity, the onus of proving notice or want of good faith was thrown upon the defendant, and there seems to have been no evidence in the case upon which the jury would have been justified in finding that the plaintiff had any reason to suppose that the defendant had signed the note under any mistake of fact. We think, therefore, that the plaintiff was entitled to a verdict on the facts shown by the case.

New trial granted, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Ordered accordingly.

FRANCES STODDARD, PLAINTIFF, v. WILLIAM JOHNSON,  
DEFENDANT.

*Legacies — when they are charged upon land — liability of residuary legatees for payment of.*

A testator, by his will, bequeathed certain specific pecuniary legacies to persons therein named, and then proceeded, "after the payment of my funeral expenses, the payment of my just debts and the payment of the legacies aforesaid, I give, devise and bequeath unto my son, William Johnson, all the rest and residue of my estate, real and personal, wherever the same may be situated." *Held*, that the legacies were charged upon the real estate, and the residuary legatee, by taking possession thereof under and by virtue of the will, became personally liable for the payment of the legacies without any express promise by him.

MOTION for a new trial on a case and exceptions, ordered to be heard in the first instance at the General Term, after a nonsuit directed at the Circuit.

*E. W. Gardner*, for plaintiff. A will giving specific legacies, and then giving the real and personal estate after paying debts, without any direction as to the payment of the legacies, is a charge upon the real estate, where the personal property is shown not to be



sufficient. (*Flynn v. Croncken*, 9 How. Pr., 214; *Lupton v. Lupton*, 2 Johns. Ch., 614; *Shulters v. Johnson*, 38 Barb., 80; *Harris v. Fly*, 7 Paige Ch., 421; *Reynolds v. Reynolds*, 16 N. Y. [2 Smith] 259 and cases cited; *Tracy v. Tracy*, 15 Barb., 503.) The defendant having accepted the devise to him, charged as it was with the payment of these annuities and legacies, it is precisely the same as though the will had given him the real estate and directed him to pay these legacies. (*Kelsey v. Western*, 2 N. Y. [2 Com.], 500; *Gridley v. Gridley*, 24 N. Y., 130, 134, 135; *Speaker v. Van Alstyne*, 18 Wend., 200; *McLachlen v. McLachlen*, 9 Paige Ch., 533; affirmed, 5 Denio, 646.)

D. B. Prosser, for defendant.

TALCOTT, J.:

This is a motion for a new trial after a nonsuit at the Yates County Circuit, and the exceptions ordered to the General Term in the first instance.

Both plaintiff and defendant are children of Daniel Johnson, late of the said county, and the action is brought to recover of the defendant the interest upon a pecuniary legacy, left to the plaintiff by the will of her late father.

Daniel Johnson died in 1871, in the month of January, leaving a last will and testament, in which, after giving to his wife the use of his house and appurtenances, and various personal property, until the 1st day of April, 1875, and bequeathing to her absolutely certain specific legacies, he gave the plaintiff a pecuniary legacy in the following words: "Third. I give and bequeath unto my daughter, Frances Stoddard, the use and income of the sum of two thousand dollars, to be paid to her annually, for and during the term of her natural lifetime, but such use and income not to commence until the first day of April, 1873. And I do hereby give and bequeath the said sum of two thousand dollars unto the surviving children of my said daughter, after the termination of her life, in equal parts, share and share alike."

The will then provides a legacy of the use and income of \$2,000 unto Samaria Johnson, the daughter-in-law of the testator, with remainder, after her death, to her surviving children by his son

George, in equal parts, share and share alike. The will then proceeds : "Fifth. After the payment of my funeral expenses, the payment of my just debts, *and the payment of the legacies aforesaid*, I give, devise and bequeath unto my son, William Johnson, all the rest and residue of my estate, real and personal, wherever the same may be situated.

"Sixthly. For the purpose of securing to my said daughter, Frances Stoddard, and the said Samaria, the wife of my son, George Johnson, the annuities hereinbefore given to them, respectively, and the bequests of the principal sums after the termination of their respective lives, I direct my executor, herein by me appointed, to securely invest upon unincumbered real estate of the value of at least double the amount, in his name as the executor of this my will, and that he receive and pay over to the said annuitants annually during the term of their lives, and the life of the longest liver of them, the said annuities as hereinbefore bequeathed to them respectively, and on the death of either, that he divide the principal sum of two thousand dollars among the surviving children aforesaid of the one so dying, in equal parts, and on the death of the longest liver of them, that he in like manner pay over to the surviving children the said principal sum of two thousand dollars in equal parts."

The will then proceeds to constitute the said son of the testator, William Johnson, the executor of the said will.

At his death the testator was the possessor of a considerable amount of personal property, and was seized of a considerable real estate, consisting of several farms in the county of Yates and elsewhere.

The plaintiffs proved on the trial that the said William Johnson had taken possession of all the real and personal property of the testator under the provision of the said will. The complaint alleged the non-payment to the plaintiff of the annuity to her, or any part thereof, and claimed to recover the three installments thereof, due on the 1st of April, 1874, 1875, 1876, and the action is brought to charge the defendant personally with such payment.

The personal property of the testator, as appeared, was insufficient to pay the debts of the testator, and the question presented by the case is, whether the annuity was a charge upon the real estate, so that the defendant, by entering into the possession thereof

under and by virtue of the will, became personally liable for the payment of the legacy bequeathed by way of annuity to the plaintiff.

If a testator gives a legacy without specifying who shall pay it, or out of what funds it shall be paid, the legal presumption is, that he intended it should be paid out of his personal estate, and if that is not sufficient, the legacy fails. In this case, the testator does not, in terms, create an equitable charge upon the real estate devised to the defendant; but that is not necessary, as the charge of a legacy upon the real estate of a testator, either in aid or exoneration of the personalty, may be, and frequently is, created by implication only. In this case, as in other matters involving the construction of a will, the intention of the testator is the point to be sought for, and when discovered, is all controlling, provided it violate no rule of law. The real estate is not charged with the payment of legacies unless the intention of the testator to that effect is expressly declared or clearly to be inferred from the language and disposition of the will. (*Myers v. Eddy*, 47 Barb., 263; *Roman Catholic Church, etc., v. Wachter*, 42 id., 43.) Looking at the whole frame of the will in this case, it cannot be doubted but that the testator intended that the legacies of \$2,000 each, to his daughter and daughter-in-law, were to be charged on the lands which were devised to the defendant under the name of residue, and he having accepted such devise and entered into the possession of the property under the will, thereby assumed personally, the obligation of paying the legacies according to the terms of the will. But, by the terms of this will, according to the well-settled law, as laid down by Chancellor KENT in *Lupton v. Lupton* (2 Johns. Chan., 614), the legacies were, by express implication, charged upon the residue of the real estate devised to the defendant.

The case of *Lupton v. Lupton* has ever since it was decided been regarded as a leading authority in such cases, and is referred to as such in all the cases on this subject in this State. It will be seen that the devise of the rest and residue to the defendant does not take effect until after the funeral expenses and debts, and after "the payment of the legacies aforesaid."

In *Lupton v. Lupton* (*supra*) Chancellor KENT states the rule for the interpretation of the will in such a case as follows: "When a testator devises the real estate *after* payment of debts and legacies,

as in *Tompkins v. Tompkins* (Proc. in Chan., 397), and in *Shurcross v. Fincler* (3 Ves., 378), or where he devises real estate after a direction that debts and legacies be first paid, as in *Hall v. Vernon* (Proc. in Chan., 430), and in *Williams v. Chitty* (3 Ves., 545) the real estate has been held to be charged. It is not sufficient that debts and legacies are directed to be paid; that alone does not create the charge; but they must be directed to be first or previously paid or the devise declared to be made after they are paid." (*Lupton v. Lupton*, *supra*, op. page, 623.)

See, also, *Shultus v. Johnson* (35 Barb., 80), where a legacy was held to be charged because spoken of as a "residue," when there was no other disposition of any real estate, although no words were used indicating that the legacy was to be paid before the devise of the residue took effect. It was held that the intention of the testator was that the legacy should be paid out of whatever property he should leave, and only the "residue" after such payment went to the devisee.

So, it has been held that when real and personal estate are mingled in one mass and so are devised to a residuary devisee and legatee, that in such case the legacies are charged on the realty. (*Tracy v. Tracy*, 15 Barb., 504.) So where the testator gave the "balance" of his estate after having given legacies (*Roman Catholic Church v. Wachter et al.*, 42 Barb., 43), the legacies were held to be charged on real estate. See, also, *Harris v. Fly et al.* (7 Paige, 421); *Lewis v. Darling* (16 How. [U. S.], 1); *Corwin v. Corwin* (9 O. E. Green [N. J.], 579). Where legacies are charged upon real estate and the personalty is insufficient for their payment, as in this case, if the devisee accepts the devise under the will, such acceptance creates a personal liability, on which an action can be maintained without any express promise. (*Gridley v. Gridley*, 24 N. Y., 130.) So that, although there was some proof in this case that the defendant had repeatedly said that he meant to abide by the provisions of the will, such proof was unnecessary. The proof was full and clear that he had entered into the possession of the real estate, claiming under the will, and it is unconscionable as well as illegal on his part to refuse to pay the provision made for his sister, the plaintiff, while assuming to take and hold the property,

which was only bestowed on him on the condition that the plaintiff's annuity should be first paid.

A new trial is granted, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Ordered accordingly.

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FLORENCE M. GIBBS, RESPONDENT, v. THE CONTINENTAL  
INSURANCE COMPANY, APPELLANT.

*Policy of insurance — agreement to refer question of amount of loss to arbitration — when not enforceable — waiver of — When house unoccupied — False valuation — must be fraudulent to avoid policy.*

The defendant issued to the plaintiff a policy of insurance upon certain personal property, by which it agreed to make good unto the assured all such immediate loss or damage as should happen by fire to the property specified, *the amount of loss to be estimated according to the actual cash value of the property at the time of the loss.*

In the ninth condition of the policy it was provided that in case differences should arise touching any loss or damage, after proof had been received in due form, the matter should, *at the written request of either party*, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy.

In the tenth condition of the policy it was provided that no suit or action against the company, for the recovery of any claim by virtue of the policy, should be sustainable in any court of law or chancery, *until after an award shall have been obtained, fixing the amount of such claim in the manner above provided.*

In this action, brought to recover the amount due thereunder, upon the destruction of the property, the defendant claimed that a difference had arisen as to the value of the property destroyed, and that as no award had been made by arbitrators, no recovery could be had under the policy. Neither party had requested, either in writing or otherwise, that the matter should be submitted to arbitrators.

*Held*, that by the terms of the ninth condition, no obligation to submit the amount of the loss to arbitrators arose, until a *written request* so to do had been made by one of the parties.

*Semble*, that the condition as to submitting the amount of the loss or damage to arbitrators was only collateral to the main agreement of the defendant, which was to pay the amount of the loss, "to be estimated according to the actual

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cash value of the property at the time of the loss," and that such collateral agreement did not deprive the plaintiff of the right to maintain an action on the policy until such reference and an award, in pursuance thereof, had been had.

*Semble*, that as the defendant, by its answer, denied its liability for any part of the loss, on grounds specifically stated therein, it thereby waived the condition requiring an arbitration, as the amount of the loss was immaterial, if the company insisted that it was not liable for any portion thereof.

The policy further provided that, "if the premises should become unoccupied without the consent of the company indorsed thereon, then and in every such case the policy should be void." The plaintiff had for some time before the fire, slept in the adjoining house, which belonged to her daughter, but had never abandoned the premises; her furniture and wearing apparel remaining there, and she returning and spending the day there.

*Held*, that the house was not unoccupied within the meaning of the condition.

Another condition of the policy provided that all fraud or attempt at fraud, by false swearing or otherwise, should cause a forfeiture of all claim on the company.

*Held*, that it was not enough to constitute a breach of this condition; that the insured in making out proof of loss, had overvalued an article destroyed by the fire, even though it appeared that she knew or ought to have known that the valuation was excessive, unless such overvaluation was made with a fraudulent intent.

APPEAL from a judgment in favor of the plaintiff, entered upon a verdict of a jury, and from an order denying a motion for a new trial, made upon a case and exceptions.

*E. C. James*, for the appellant.

*J. A. Hathaway*, for the respondent. The house was not occupied within the meaning of the conditions of the policy. (*Gambell v. M. U. Ins. Co.*, 12 Cush., 167; *O'Neil v. The Buffalo F. Ins. Co.*, 3 Com., 122; *Wastburn v. City F. Ins. Co.*, 15 Wis., 138; *Cummings v. Agri. Ins. Co.*, 5 Hun, 554; *Paine v. Agri. Ins. Co.*, 5 S. C., 619; *Rann v. Home Ins. Co.*, 59 N. Y., 387; *Gates v. Madison Ins. Co.*, 1 Seld., 469; *Sherman v. Niagara Ins. Co.*, 46 N. Y., 532; *Kelly v. Home Ins. Co.*, 2 Weekly Digest, 479.)

TALCOTT, J. :

This is an appeal from a judgment in favor of the plaintiff, entered on a verdict at the Oswego Circuit, and from an order refusing a new trial.

The plaintiff owned a two-story frame dwelling-house, situated on Oneida street, in Oswego. On the 7th day of March, 1873, the defendant, through E. J. Harmon, its agent at Oswego, issued its policy insuring the plaintiff against loss or damage by fire in the sum of \$2,000 on the house and \$1,200 on the furniture, wearing apparel, etc., therein, for one year. On the 7th day of March, 1874, the policy was renewed for one year. On the night of the 22d day of October, 1874, the said property so insured was damaged by fire. On the 4th day of November, 1874, the plaintiff made proof of loss in due form, stating the damages by the fire to the house to be \$4,000 and to the personalty at \$3,326.86. The articles of personalty exceeded 1,000 in number. By the ninth condition of said policy it is provided as follows: "In case differences shall arise touching any loss or damage, after proof has been received in due form, the matter shall, at the written request of either party, be submitted to impartial arbitrators, whose award in writing shall be binding on the parties as to the amount of such loss or damage, but shall not decide the liability of the company under this policy, and it shall be optional with the company to repair, rebuild or replace the property lost or damaged with other of like kind or quality within a reasonable time, giving notice of their intention so to do within sixty days after receipt of proofs herein required."

The tenth condition of said policy was as follows: "It is furthermore provided and mutually agreed that no suit or action against this company for the recovery of any claim by virtue of this policy shall be sustainable in any court of law or chancery until after an award shall have been obtained fixing the amount of such claim in the manner above provided, nor unless such suit or action shall be commenced within twelve months next ensuing after the loss shall occur; and should any suit or action be commenced against the company after the expiration of the aforesaid twelve months, the lapse of time shall be taken and deemed as conclusive evidence against the validity of such claim, any statute of limitation to the contrary notwithstanding."

The bill of exceptions states that it was proved that shortly after the proofs of loss were received, the agent and adjuster of the defendant called upon the plaintiff with the proofs of loss, and that differences then and there arose between the plaintiff and the defend-

ant, touching the loss or damage sustained by the plaintiff, and that they disagreed in every thing as to values, and disagreed as to the amount of loss. The bill of exceptions contains the statement that "no proof was offered by either party to show that after these differences arose, any thing was done or any request was made by either party to submit the question of the amount of such loss to arbitration, or to show any thing which prevented the submission of such question to arbitration before action brought, or to show any waiver of the requirements of the policy in respect to such arbitration."

The defendant moved for a nonsuit upon the ground that this action cannot be maintained until after an award of arbitrators, fixing the amount of the loss. The question was reserved by the court, with other questions in the case, and was finally decided against the motion for a nonsuit, and judgment was ordered for the plaintiff in the action, after argument at Special Term.

While prospective contracts to arbitrate all matters of difference which may arise between the parties have been held void as tending to oust the courts of jurisdiction, and hence contrary to public policy (*Hurst v. Litchfield*, 39 N. Y., 377), yet it may be considered as the settled law of this State that contracts to arbitrate a particular subject-matter, such as the *amount* of a loss or the *value* of property, etc., are not only valid and binding on the parties, but may be made by agreement a condition precedent to the right to maintain an action involving such amount or value.

In this case, however, the agreement to refer to arbitration was a collateral contract to the main contract, by which the insurance company agreed in the policy to "make good unto the assured, her executors, etc., all such immediate loss or damages \* \* \* as shall happen by fire to the property so specified. \* \* \* The amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss, and to be paid in sixty days after proof of the same, required by the company, shall have been made by the assured and received at this office, and proved in accordance with the terms and provisions of this policy."

In the case of *Scott v. Avery* (5 House of Lords Cases, 811), principally relied upon by the defendant's counsel, there did not



appear to be any independent agreement to pay the amount of the loss within a specified time. The question there presented is briefly stated by CROWDER, J., one of the judges who, in the House of Lords, delivered an opinion in favor of sustaining the judgment of the Exchequer Chamber, thus : " The question, then, seems to resolve itself into this, whether such a contract can legally be made so as to bind the contracting parties? Can a shipowner and insurer enter into a valid agreement, that the shipowner shall pay down a given sum, and that in consideration of such payment the insurer, upon the loss of a given ship, shall pay to the said owner not the amount of the loss sustained by him through the perils of the sea, but only such a sum of money as shall be settled and ascertained by arbitration? I am not aware of any legal objection to such a contract, whatever may be thought of its prudence, and I think the effect of such a contract is that no action lies for the breach of it until the sum has been ascertained by arbitration."

Mr. Justice CRESWELL, in the same case, says (see page 838): "for if there is an ordinary contract of insurance, that would give a right of action immediately on the happening of the loss, and a rule (condition) requiring the assured to wait for an adjustment of the loss by the committee would be repugnant to the contract."

In *Roper v. London* (1 Ellis & Ellis, 825), Lord CAMPBELL, who had delivered one of the leading judicial opinions in *Scott v. Avery*, in the House of Lords, held that a plea setting up a condition substantially like the one in this case, and that the company had never declined, but had always been ready to refer such dispute to the judgment and determination of two indifferent persons as arbitrators in the manner provided for by such condition, of which the plaintiff had notice before suit, and that the said dispute or difference, "and the amount of the plaintiff's supposed loss or damage, had never been determined, as by the same condition is provided" was bad, saying: "The agreement to refer, contained in the fifteenth condition, is merely collateral to the agreement to pay. The courts will not, therefore, treat the agreement to refer as ousting their jurisdiction until there has been a reference."

And HILL, J., in the same case, said: "The case is clearly, not within the case of *Scott v. Avery*. Here the agreement to refer is collateral to the agreement by the company to pay; there

the agreement was to pay only such sum as the arbitrators should award."

The case of *The President of the Delaware and Hudson Canal Company v. The Pennsylvania Coal Company* (50 N. Y., 250) was also much relied upon by the counsel for the defendants to show that the reference to arbitrators in this case was a condition precedent to the right of the plaintiff to maintain any action upon the policy. In that case it appeared that the Delaware and Hudson Canal Company, proposing to enlarge their canal, entered into a contract with the defendants whereby it was in substance "agreed that the canal company might charge an increased toll on the coal which should be transported through the canal by the defendant, the amount of such increased charge to be based upon the estimated costs of transportation per ton on said canal after the enlargement should have been made, which increased charge was to be one-half of the estimated reduction in the cost of transporting the coal, effected by such proposed enlargement; and if the parties should not agree on the just and proper amount of reduction produced by the proposed enlargement, then the contract provided that the question should be submitted to two person, one to be chosen by each party, and if these two were unable to agree, they were to choose a third person, and the report of a majority of the three to be final on the subject of the amount the defendant was to pay by way of additional toll."

ALLEN, J., delivering the majority opinion, says: "The plaintiffs, under the agreement, secured to themselves the right to certain tolls, absolutely, for the use of their canal, to be ascertained from year to year in the manner and by the rules prescribed. \* \* \* the defendant undertook to pay in addition to the toll before then chargeable at a rate *to be established* after the canal enlargement should be completed in the manner particularly prescribed, and arbitration was the final resort agreed upon to establish the rate and amount of toll in case the contracting parties should not be able to agree, and the decision of the arbitrators was to be final in the premises. \* \* \* The manner by which the rate of toll was to be established was by the agreement of the parties or, that failing, by arbitration. \* \* \* The right of the plaintiffs is only to an additional rate of toll "*to be established*"

and the ageement prescribes the rule and designates the means and agency by which the additional toll is to be computed, estimated and thus established. The right of the plaintiff to demand, and the obligation of the defendants to pay, additional toll is restricted to the rate to be established pursuant to the agreement. \* \* \* The clear and plain intent of the parties was that the additional rate of toll should "be established" as preliminary to the right of the plaintiffs to charge and collect. \* \* \* Neither party contemplated the possibility of, or would have agreed to, a rate of toll to be determined by a jury in an action which the plaintiffs might bring for the recovery of the toll upon the first cargo of coal that might pass through the canal after the enlargement," and he adds, "*Scott v. Avery (supra)* is, in principle, on all fours with the case at bar, and unless we are prepared to overrule or disregard it, is decisive."

The contract to refer in the case in 50 New York, it will be seen, was not deemed a collateral contract, but the only mode by which the amount to be paid could be determined. There was no agreement to pay any amount in that case, except as should "be established" in the manner prescribed by the agreement. In the opinion in the case in 50 New York, ALLEN, J., recites the case of *Roper v. Lendon* (1 Ellis & E. [L. B.] 825) as belonging to a class of cases "which involved the validity of covenants which deprived the parties of the protection of the courts, and ousted the court of all jurisdiction." Whereas we have seen that the case of *Roper v. Lendon* was placed upon the ground that the agreement to refer to arbitration was collateral to the main contract.

*Adams v. Willoughby* (6 Johns., 65, 67), so far as it is an authority on this subject, seems to stand on the same ground as to the "unliquidated demands" mentioned in that case. There was no obligation on the part of the defendant to pay *any* sum, except such sum as the arbitrators should determine was due to the plaintiff from Josiah Fuller. As there was no reference to arbitration to determine the amount of the unliquidated sums, there was no mode by which the amount to be paid by Willoughby could be ascertained.

In *Stephenson v. Piscataqua Fire Insurance Company* (54 Maine, 55) it was held, after considering the case of *Scott v. Avery (supra)*, that a condition in a policy similar to that in question, was void,

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because it deprived the parties of the protection of the law, and tended to oust the courts of jurisdiction.

The insurers in this case have apparently sought to avoid the effect of that and similar decisions by ingeniously adding to the condition that the award of the arbitrators should be binding as to the amount of the loss, "but shall not decide the liability of this company under this policy," and possibly they have escaped the general condemnation of such conditions, as being contrary to public policy, by this provision. However that may be, we think the condition is collateral to the main contract, which is "to make good unto the said assured \* \* \* all such immediate loss and damage, \* \* \* as shall happen by fire to the property so specified \* \* \* not exceeding in amount the sum or sums insured as above specified \* \* \* the amount of loss or damage to be estimated according to the actual cash value of the property at the time of the loss." And although if a reference to arbitration had taken place under the condition, perhaps the award would have been conclusive as to what that cash value was; yet, as no such reference had taken place, we do not think the plaintiff was, by the collateral agreement to refer, deprived of the right to maintain an action on the policy until such reference and an award in pursuance thereof had been had.

But aside from the question whether the contract to refer to arbitration was collateral to the obligation to pay, and the obligation not dependent upon the result of the agreement to refer, we think, by the terms of this contract, the contingency, upon the happening of which the obligation to refer to arbitration would arise, does not appear to have happened. The duty to submit to arbitration was, by the ninth condition, made to depend upon the "written request of either party," and the tenth condition restraining any suit or action for the recovery of any claim by virtue of the policy, does not operate unless an arbitration shall be requested in "writing in the manner above provided."

We think, therefore, that even if the submission to arbitration might be a condition precedent to the right to maintain an action on the policy, provided a written request for such an arbitration had been made by either party; yet that such "written request," by one or the other of the parties, was of itself, a condition precedent to the right to require an arbitration, and that no obliga-

tion to submit to arbitration arose until such written request was made by one or the other of the parties. It seems that no evidence was offered by either party to show that there was any such request within the sixty days, at the expiration of which time the loss was payable, and the plaintiff, as we think, had, at the expiration of that time, a right to assume, in the absence of a written request, that the defendant did not desire to have the question of the amount of the loss submitted to arbitration, but chose to rely on one or more of the numerous defenses set up in the answer.

To give these conditions such a construction as is insisted upon by the counsel for the defendant, would be to ignore the prerequisite of a written request, and to, in effect, hold that those words in a condition, either have no meaning at all, or else to debar an action on the policy for an indefinite time, although neither party desires an arbitration. The insurance company knew that a case had arisen in which arbitration might be required, if requested, to wit: "differences touching loss or damage." It refrained from requesting any submission of these differences to the arbitration provided for by the conditions of the policy, and the attempt now to set up that no action can be maintained on the policy, until such an arbitration has been had, operates as a surprise upon the plaintiff who, as we think, was justified in supposing that the defendant, having made no request for an arbitration, did not desire any. The language of the condition was calculated to lead the assured to suppose that, in the absence of any request for an arbitration on the part of the company, no arbitration was necessary as a condition precedent to the right to sue for the amount of the loss and damage, "to be estimated according to the actual cash value of the property at the time of the loss." And we think that the omission of the company to signify its desire for an arbitration within the sixty days, was a waiver of the ninth and tenth conditions, on its part.

The answer of the company denies its liability for any part of the loss, upon various grounds, specifically alleged in the answer. It has been held, in various cases, that the condition to arbitrate concerning a loss where differences arise as to the amount, is waived where the insurance company denies its liability for any loss, whatever the amount may be. Because the *amount* of the loss is imma

terial, if the company insists it is not liable for any loss, and is calculated to mislead the insured as to the true grounds of the objection of the company to the payment of the loss. (See *Robinson v. Georges Ins. Co.*, 17 Maine, 131; *Mentz v. Armenia Fire Ins. Co.*, 79 Penn. St., 478.) But without resting our decision upon this ground, we are of the opinion that the plaintiff had a right to waive a submission to arbitration, which she has done by omitting to request one, and that the defendant has also waived the condition, by refraining from making known its desire for an arbitration, in the manner provided for in the condition.

The second exception presented by the defendant for our consideration is founded upon a further condition in the policy, as follows: "If the premises become unoccupied without the consent of this company indorsed hereon, \* \* \* then and in every such case this policy shall be void." The evidence in the case showed that the plaintiff had slept at night for some time, but for how long it did not clearly appear, at her daughter's house, who lived in the adjoining house to the one which was occupied by the plaintiff, but she had never abandoned the premises, and although lodging in her daughter's house, her furniture and wearing apparel was left at her own. She returned daily to the premises insured, and, as we understand the testimony, spent the day there. This was not such an abandonment of the insured premises or ceasing to occupy as is within the meaning of the condition referred to. (*Shearman v. Niagara Ins. Co.*, 46 N. Y., 532; *O'Neil v. The Buffalo Fire Ins. Co.*, 3 Comst., 122; *Cummins v. The Ag. Ins. Co.*, 67 N. Y., 260; *Garnwell v. M. and F. Ins. Co.*, 12 Cushing, 167.)

Though the answer of the court to the request of the plaintiff's counsel may be understood as taking the question, whether the house had become unoccupied, within the meaning of the condition, from the jury, we think the charge that the house was not proved to have become unoccupied within the meaning of the condition, taken in connection with the explanation contained in the former part of the charge, as to what was ceasing to occupy within the meaning of the condition in question, was correct.

The third exception, taken by the counsel for the defendant, was founded upon the fact that in the proofs of loss furnished by the

plaintiff to the company, she had stated the value of a piano at \$400, whereas, it was shown by a witness, from whom she purchased the piano about fourteen years before the trial, that she bought it for \$300, and that in the opinion of the witness, if well used, it would probably be worth at the time of the fire, no more than from \$125 to \$150. The plaintiff had stated, on her examination as a witness, that she put down the values at what she remembered the articles cost, as near as she could; that she could not remember what the piano cost, but that a music dealer had offered her \$400 for it in exchange for another piano. It was proved by another witness, an expert, that he knew the piano in question, that it had been used very little, and that, in his judgment, the piano at the time of the fire was worth \$300.

At the close of the charge to the jury, the defendant's counsel asked the court to charge "that if the jury find that the plaintiff, in her proofs of loss, knowingly put false valuations upon her property destroyed, that her policy is forfeited and she cannot recover." The court refused so to charge unless the word "*fraudulently*" should be inserted in the request. The import of the ruling of the judge was that the overvaluation placed upon her property by the plaintiff in her proofs of loss, even if she had reason to know or ought to have known that such valuation was above the market value, did not occasion the forfeiture of the policy unless done with intent to defraud the defendant. The condition of the policy which bears upon this subject is as follows, a part of the ninth condition: "All fraud or attempt at fraud by false swearing or otherwise shall cause a forfeiture of all claim on this company under this policy;" and we think the justice at the Circuit was correct in holding that a fraudulent intent was a necessary ingredient in the false valuation, even though there might be evidence from which the jury might have come to the conclusion that the plaintiff knew or had the means of knowing, or ought to have known, that the valuation in the proofs of loss was overstated. (*Ins. Co. v. Weides*, 14 Wall. [U. S.], 375; *Unger v. The People's Fire Ins. Co.*, 4 Daly, 96; *Wolf v. Goodhue Ins. Co.*, 43 Barb., 400; *Sturm v. Gt. Western Ins. Co.*, 40 How. Pr., 423; *Owens v. The Holland Purchase Co.*, 1 Sup. Ct. [T. & C.], 285; *Hickman v. The Long Island Ins. Co.*, 1 Edw., 374.) Overvalua-

tion may afford evidence of a fraudulent intent, but is not of itself conclusive evidence of such an intent.

Most persons would be apt to set a value upon articles which they have had long in their possession, as personal belongings, especially articles of furniture, far in excess of what they would be appraised by an auctioneer or dealer in second-hand furniture. They may be, and usually are to the owner, of more value than could be obtained in the market, and the requisition by the judge at Circuit, that the overvaluation must have been not only knowingly but with a fraudulent intent, was within the very terms of the condition of the policy, which, it was claimed, had been violated by the statement of the value in the preliminary proofs of loss.

The remaining exceptions to which our attention is called relate to the admission of evidence which was objected to, and we think that so far as the rulings are liable to criticism, they were upon immaterial matters, which could not have influenced the result, and on the whole bill of exceptions we think the judgment should be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment and order of the Special Term affirmed.

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ALONZO C. YATES AND THEODORE DISSEL, RESPONDENTS,  
v. CORYDON BURCH AND JAMES McQUEEN, APPELLANTS.

*Appeal by executor — security on — failure to apply for limitation of, amount of, under Code, § 339 — presumption of assets, arising from — Meaning of "adverse party."*

Although section 339 of the old Code authorized the court to dispense with or limit the security, required by sections 335, 336, 337 and 338 to be given upon an appeal, when the appellant was an executor, administrator or trustee acting in the right of another, yet when an executor without making any application to have the security limited or dispensed with gives the security in the ordinary form, the giving of such undertaking will be taken as an admission by him that he has sufficient assets applicable to the payment of the judgment appealed from to satisfy the same.



The term "adverse party," as used in section 848 of the Code, requiring notice of the entry of judgment, affirming the judgment appealed from, to be served upon the "adverse party" at least ten days before commencing an action upon the undertaking, means the parties to the original judgment by whom the appeal was taken.

APPEAL from a judgment sustaining a demurrer to the second defense alleged in the answer of the defendants.

*Hunt & Weaver*, for the appellants.

*Ruger & Jenny*, for the respondents.

TALCOTT, J. :

Appeal from judgment rendered at Onondaga Special Term, sustaining the demurrer of the plaintiffs to the second answer of the defendants.

The action is brought by the plaintiff on an undertaking, given by the defendants in the original action, on an appeal to the General Term from a judgment rendered in the Supreme Court against Henry C. Hoffman and Israel McDonald, as executors of the will of Chester W. Ryant, deceased.

The second answer of the defendants, which is demurred to, alleges that the judgment was recovered on a liability incurred and contracted by the firm of Chester W. Ryant & Co., composed of Chester W. Ryant, now deceased, and Seth D. Ryant, also now deceased. That said judgment could be enforced only against the individual property of the said Chester W. Ryant, in the hands of the executors remaining after paying the individual debts of the said Chester W. Ryant, deceased, and that there is a deficiency of personal assets which have or should properly have come to the hands of said executors, and said executors having fully administered upon said assets, said deficiency still remains, and there is not sufficient assets in said executors' hands to pay the individual debts of said Chester W. Ryant, deceased, and that said executors were not adjudged by the judgment in the complaint described, to be personally liable to said plaintiffs, nor required to pay said judgment, except by the proper administration and application of the assets in their hands as such executors, if any there were, applicable to the

payment of the plaintiffs' alleged claim, and that the defendants are not liable and cannot be held to a greater or different liability than the liability of said executors in said alleged judgment.

Section 339 of the Code of Procedure, in force when the undertaking which is sued on in this case was given, provides that when an appeal is perfected as provided by sections 335, 336, 337 and 338, the court below may dispense with, or limit the security required by sections 335, 336 and 338, when the appellant is an executor, administrator or trustee, acting in another's right. Thus, in effect, providing, that the court below may absolve the executor from all obligation to give security on the appeal where a proper case is made for such absolution. Section 339, by its terms, relates only to security to be given on appeals to the Court of Appeals. But section 348 provides that on an appeal to the General Term, such an appeal does not stay the proceedings, unless security is given, as upon an appeal to the Court of Appeals. A statement of a want of assets sufficient to pay the judgment appealed from, would doubtless be regarded as a good reason why the security should be limited to the amount of assets disclosed applicable to the payment of the judgment, or for dispensing with security altogether when there is reasonable doubt of the affirmance of the judgment appealed from. In this case, it does not appear that the defendants in the original judgment ever made any application to the court below for leave to appeal without security, or in any manner to limit the security to be given, and under such circumstances the giving of security in the ordinary form must be taken as an admission of sufficient assets, applicable to the payment of the judgment appealed from, to satisfy the same. (*Mills v. Forbes et al.*, 12 How. Prac. R., 466.)

The counsel for the defendant seeks to attack the sufficiency of the complaint, on the ground that it does not show a service of a notice upon the "adverse" party of the entry of a judgment affirming the judgment appealed from, ten days before the commencement of an action on the undertaking. That such a notice must be averred in a complaint in an action on an undertaking of appeal, is settled by the case of *Porter v. Kingsbury* (5 Hun, 597, affirmed by the Court of Appeals, 5 vol. Weekly Dig., 161).

The averment in the complaint in this case is, that notice of the judgment of affirmance was, more than twenty days prior to the com-

mencement of the action, "duly served by mail upon the attorney for the adverse parties and judgment-debtors therein described by the attorneys for the plaintiffs therein, to wit: upon M. V. B. Bachman, Esq., attorney for said Hoffman's and McDonald's executors, etc., as above set forth."

The section, 348, of the Code of Procedure, provides that the notice must be served on "the adverse party." There was, then, no adverse party except the defendants in the original judgment, who were appellants, and we think this is the "adverse party" meant by section 348, and this construction is made more plain by section 1306 of the Code of Civil Procedure, by providing that such service shall be on the attorney for the appellant. The objection is taken that the averment does not state the facts as to how the service by mail was made, so as to show it to have been done in compliance with the rule on that subject. This is not an objection to the substance of the complaint, but only to the form which might have been the subject of a special demurrer, but cannot be objected to under the rule that judgment shall be against the party who has committed the first fault in pleading. (*Doty v. Russell*, 5 Wend., 129.)

The order sustaining the demurrer must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Order sustaining the demurrer of the plaintiff to the second defense alleged in the answer of the defendant, affirmed.

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AMELIA PLOPPER, RESPONDENT, v. THE NEW YORK  
CENTRAL AND HUDSON RIVER RAILROAD COM-  
PANY, APPELLANT.

*Contributory negligence — when question should be submitted to the jury.*

At Kirkville, on the defendant's road, the station and depot are on the north side of the track, and passengers generally get off on the north side of the cars. Along the south side of the track, and very close to it, is a ditch. The plaintiff, a resident of the place and well acquainted with the situation of the depot, attempted to get off the train, on the south side, at a point where the track was intersected by a highway running at right angles with it, at a time when the

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train had stopped or was running very slowly. The conductor, who was on the north side of the train, not seeing the plaintiff, who was on the lowest step of the car, signalled the engineer to go on, and by his so doing the plaintiff was thrown off and injured. It was proved that when the cars stopped on the highway it was not unusual for parties to alight from the cars on the southerly side of the train, which was the side nearest to the village.

*Held*, that it was error for the court to charge, as matter of law, that the attempt to alight on the southerly side of the train did not constitute contributory negligence; that whether it did or not should have been submitted to the jury.

APPEAL from an order denying a motion for a new trial made by the defendant, after a verdict for the plaintiff.

*G. W. Kennedy*, for the appellant.

*W. C. Ruger*, for the respondent.

TALCOTT, J. :

This is an appeal from an order made at the Onondaga Circuit denying a motion for a new trial on the minutes, after a verdict at the same Circuit for the plaintiff.

The action is to recover damages for an injury to the plaintiff, a passenger, caused by the alleged negligence of the defendant. The injury occurred at Kirkville, a few miles east of Syracuse, to which place the plaintiff was a passenger on one of the defendant's trains from Syracuse. A prominent question on the trial was whether the plaintiff was not guilty of contributory negligence which conduced to the injury, by attempting to get off the cars on the south side of the train in place of getting off on the north side, where the depot was located, and on which side passengers generally alighted from the defendant's trains, and on which north side several passengers alighted in safety on the occasion in question.

It appeared that the plaintiff resided at Kirkville, and was well acquainted with the station and its surroundings. There was on the south side of the railroad track, on which the train from which the plaintiff alighted stood, a ditch running parallel to, and along the south side of, the track, and as near to the track as it could with safety to the track be constructed. The plaintiff was in the habit of frequently using the railroad in going to Syracuse and returning,

and knew that the customary place to alight from the trains was on the north side of the track, where the depot was located, and on which side the conductor of the train was placed to assist passengers in alighting from the trains. The train in question stopped but a short time, a minute or less, at this depot, and it was a question in controversy on the trial whether the train stopped at all or only slowed up, and whether it was not actually in motion when the plaintiff undertook to get off. The plaintiff had never attempted to alight from the train on the south side except on this occasion. On this occasion she came out of the car, as it was slowing down, on to the rear platform, and casting a bundle which she was carrying down into the highway which crosses the railroad at right angles at that point, proceeded down the steps of the car.

When she arrived at the bottom step, with her right foot upon the ground and the other upon the step, and with her left hand holding the rail, the conductor, being upon the north side of the train and not perceiving that any person was in the act of alighting on the south side of the train, had given a signal to the engineer indicating that the train was to proceed, and when the plaintiff was in this position, one foot upon the ground and the other upon the car step, the train had acquired such speed that it was impossible for the plaintiff to recover herself, and she was dragged along in that manner for a few feet until her hold upon the rail was broken and she was thrown into the ditch, and it is alleged received the injuries for which she claimed to recover.

The judge at the Circuit instructed the jury that as matter of law the attempt on the part of the plaintiff to leave the cars on the south side was not evidence of such contributory negligence as would prevent the plaintiff's recovery; in this, we think, he erred. As we understand the rule to be settled by the Court of Appeals: "Where a railroad company has provided a depot and conveniences for getting on and off its trains, passengers have no right to get on or off at other places, and to attempt to do so would be such negligence as would preclude them from recovering for an injury received thereby." This was laid down as the law governing such cases in the case of *Keating v. The N. Y. Central R. R. Co.* (49 N. Y., 673), affirming the judgment of this department in the same case (reported in 3 Lansing, 469).

In that case, although it appeared that there was a depot provided for the accommodation of passengers, where provision had been made for their entrance into the cars, and where the conductor was accustomed to give the signal for the starting of the train, which was the only place at which such provision had been made, yet the plaintiff attempted to enter the cars while they were standing across a street in which she was passing in attempting to reach the depot, and which so interrupted the passage of the street that she could not pass without crossing the platform of the cars.

There was evidence also given in that case that it was customary for persons to take the cars of the defendant while standing across the street in question at the place where the plaintiff attempted to take the cars. In that case this court held that the question of contributory negligence on the part of the plaintiff was a proper question to submit to the jury, and the Court of Appeals affirmed the decision in 49 N. Y., 673 (*supra*).

In the case at bar there was evidence to the effect that when the cars stopped in the highway, which was planked over, it was not unusual for parties to alight from the cars on the southerly side of the train, which was the side nearest to the village of Kirkville, and it was probably while the car in which the plaintiff was a passenger was standing, or as she supposed about to stop over the highway, that she commenced the attempt to alight, and it is quite possible she would have had time to have descended from the cars in safety had not they been suddenly started up. This, however, is inference to be drawn by the jury in view of all the circumstances and not by the court, and the error at the Circuit was in not submitting this to the jury as a question of fact, but holding as a matter of law that the attempt on the part of the plaintiff to alight on the south side of the train did not furnish any evidence of contributory negligence.

Order reversed and new trial granted, costs to abide the event. .

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Ordered accordingly.

THEODORE P. BALLOU, APPELLANT, v. MAURICE E. JONES  
AND EMMA A. JONES, RESPONDENTS.

*Fraudulent conveyance — what must be done by creditor before he can attack it —  
Non-resident debtor.*

Where an action is brought against a debtor of the plaintiff and one to whom such debtor has fraudulently conveyed certain real estate, while so indebted, to set aside such conveyance and to satisfy plaintiff's claim from the proceeds arising upon the sale thereof, it must be alleged in the complaint and proved upon the trial, that plaintiff has recovered a judgment against the debtor and has exhausted all available legal remedies against him.

It is not sufficient to show that the debtor is a non-resident of this State and has no property herein, so long as it appears that he is living in another State, and may be proceeded against by the ordinary forms of law existing therein.

APPEAL from a judgment in favor of the defendant Emma A. Jones, entered upon an order sustaining a demurrer to the complaint.

*Richardson & Adams*, for the appellant.

*S. E. Day*, for the respondents.

TALCOTT, J. :

This is an appeal from an order made at the Cayuga Special Term ordering a judgment in favor of the defendant, Emma Jones, on her demurrer to the complaint.

The complaint alleges, in substance, an indebtedness of Maurice E. Jones to the plaintiff, upon a covenant made by said Maurice to the plaintiff in 1874. That Maurice E. Jones owned 234 acres of land in Herkimer county worth about \$1,500, and in July, 1876, exchanged the said 234 acres with one Parker for a house and lot in Cayuga county worth about the same amount. That it was agreed between said Maurice E. Jones and Parker that in consideration of the conveyance of the 234 acres, said Parker and wife should convey the house and lot in Cayuga county to Emma Jones, the sister of said Maurice E., and it was so conveyed. That said Emma did not pay or secure any part of the consideration but the same

was wholly paid by said Maurice. That the conveyance to Emma was fraudulent as against the plaintiff and that a trust was thereby created and resulted in favor of the plaintiff as such creditor, to the extent necessary to satisfy his just demands. That the defendants are not residents of this State, but that Maurice resides in Pittsfield, in Massachusetts, or in Nebraska, and the defendant Emma resides in Pittsfield in Massachusetts. That neither of them has or owns any other property in this State, and that no process of any court in this State can be personally served upon either of them. That Maurice E. Jones has no property in this State out of which a judgment can be collected, *wherefore* the plaintiff has no available remedy for the relief sought in this action.

The complaint then demands the relief that he recover judgment against the said Maurice E. Jones for the amount due on the said covenant with costs of the action.

Secondly. That the house and lot in Cayuga county be sold under the direction of the court and the proceeds, so far as may be necessary, be applied to the payment of the amount due the plaintiff. The defendant Emma A. Jones demurred to the complaint assigning as causes of demurrer :

First. That several causes of action were improperly united.

Second. That the complaint does not state facts sufficient to constitute a cause of action against her.

In the case of *Estes v. Wilcox* (67 N. Y., 264), the Court of Appeals reversed the judgment of this department, sustaining a demurrer to a complaint alleging that one Joshua Whipple, in his lifetime, caused certain real estate, which had been purchased and paid for by him, to be conveyed to Ruth D. Wilcox, for the purpose of hindering, delaying and defrauding the creditors of the said Whipple ; that, at the time of the said conveyance, Whipple was indebted to the plaintiff, and that Whipple had died insolvent before the commencement of the suit, and asking that the said real estate be sold for the payment of the debt so due to the plaintiff. The defendant, Ruth D. Wilcox, demurred to the complaint, on the ground that the complaint did not state facts sufficient to constitute a cause of action.

In the case at bar, the said Maurice E. Jones is living, and there is no averment of his insolvency. No judgment has been recovered



against him for the plaintiff's demand, but the plaintiff seeks to excuse the want of such judgment by the averment that Maurice E. Jones is a non-resident of this State, so that process cannot be personally served upon him, and that he has no property in this State subject to execution.

The Court of Appeals say, in *Estes v. Wilcox* (*supra*), that "the reason of the rule that the creditor's debt must be ascertained by judgment before proceeding in equity, does not fail by the death of the debtor before judgment recovered for the debt. The creditor may prosecute the claim to judgment against the personal representatives of the debtor; and, although it would not be conclusive against his heirs or his grantees, by title acquired before his death, or in this case against the defendants, it would conclude the creditor as to the amount of his debt. In a suit against the personal representatives of the debtor to recover it, any defense which the debtor himself had could be interposed, and the claims would be subject to set-off or the plea of the statute of limitations, or to any defense existing when the action was brought. These questions would be settled, as between the creditor and the estate, by the judgment in the creditor's action against the representatives. It is convenient and reasonable to require this to be done before subjecting third persons to litigation with the plaintiff, who may never be able to establish any claim against the estate." (See, also, to the same effect, *Allyn v. Thurston*, 53 N. Y., 622.)

All available legal remedies must be first exhausted against the debtor before a creditor can come into equity to enforce the collection of his debt from the property of a third person. A judgment recovered against Maurice E. Jones in Massachusetts, the place of his residence, and an execution returned unsatisfied thereon, would be sufficient evidence of the exhaustion of legal remedies against the debtor. (*McCartney v. Bostwick*, 32 N. Y., 53.) Moreover, such judgment would probably be conclusive against the defendant Emma, in the absence of fraud or collusion.

We think the fact that a debtor is a non-resident, and has no property within the State, does not show that all legal remedies against him have been exhausted — where he is living, and presumptively solvent, and may be proceeded against by the ordinary forms of law in a sister State, where he resides — and that the

demurrer was properly sustained on the authority of *Allyn v. Thurston* and *Estes v. Wilcox* (*supra*).

Judgment should be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed, with costs.

RICHARD FRALICK, RESPONDENT, v. IRA BETTS, JAMES H. LOOMIS AND JUDSON W. LOOMIS, APPELLANTS.

*Admiralty jurisdiction — chap. 482 of 1862 — constitutionality of — Canal boat — when a "vessel."*

Admiralty jurisdiction does not extend to contracts relating to a vessel wholly engaged in the internal commerce of a State, and no maritime lien or claim can be founded on such contracts.

Chapter 482 of 1862, providing for the collection of demands against ships and vessels is, so far as it relates to vessels wholly engaged in the internal commerce of this State, constitutional and valid.

A canal boat is a "vessel" within the meaning of the said law.

The owner of a canal boat made a contract with Pierce & Son, by which the latter were to make certain repairs in and upon the boat. The repairs were made and the price to be paid therefor was paid by the owner to Pierce & Son. The plaintiff, who had been employed by Pierce & Son, to work upon the boat, not having been paid for the services rendered by him, sought to enforce his claim against the boat under the said statute.

*Held*, that he had no right so to do, as his employment by Pierce & Son gave him no right under the law of 1862 to claim a lien.

APPEAL from a judgment in favor of the plaintiff, entered upon the report of a referee.

W. A. Boucher, for the appellants.

F. David, for the respondent.

TALCOTT, J.:

This is an appeal from a judgment rendered on the report of a referee.

The action is upon a bond to procure the discharge of a canal

boat, seized by the sheriff of Oswego county, on a process issued by the county judge of that county under the act providing for the collection of demands against ships and vessels, (Laws of 1862, chap. 482.) The referee reported in favor of the plaintiff for a balance due him on a demand originally belonging to him, and on two demands which had been assigned to him for the sum of \$231.65. From this judgment the defendants appeal.

The canal boat in question, the J. K. Post, was owned by one J. D. Hartson, and was by him taken to the dry dock of J. L. Pierce & Son, at the village of Phoenix, in Oswego county, for repairs, and she was repaired by the said J. L. Pierce & Son, and men in their employ, under a contract with J. L. Pierce & Son. The latter were to do the work and furnish the materials. The plaintiff Fralick, and his assignors, were workmen for the said J. L. Pierce & Sons, and as such worked on the said boat in making the said repairs, and also on the other boats which were at the time in the said dry-dock for repairs. The said John D. Hartson paid J. L. Pierce & Son in full for the work done and materials used in the repairs of the said boat, including the work done by the plaintiff and his assignors of the other demands. But Pierce & Son have not paid the plaintiff or his said assignors. On the 17th day of October, 1874, Fralick, the plaintiff, made application to the county judge for a warrant to enforce his claim by a seizure of the boat under the act of 1862, and such warrant was issued, and the boat was seized by the sheriff of Oswego county on the 16th day of November, 1874.

It is held that a canal boat is a "vessel" within the meaning of the law of 1862, before referred to. (*Emmons et al. v. Wheeler et al.*, 3 Hun, 545; S. C. more fully in 5 Sup. Ct. Rp., by Thompson & Cook, 618; *Crawford v. Collons*, 45 Barb., 269.)

The defendants insist that the law is unconstitutional and void, as attempting to confer on State courts jurisdiction of subject-matters of admiralty jurisdiction, in regard to which, jurisdiction is vested exclusively in the courts of the United States. (*In re Josephine*, 39 N. Y., 19; *Vose v. Cockcroft*, 44 N. Y., 415.) But admiralty jurisdiction does not extend to contracts relating to a vessel wholly engaged in the internal commerce of a State, and no maritime lien or claim can be founded on such contracts, and the courts of the United States are wholly without jurisdiction in such cases.

(*Maguire v. Card*, 21 Howard [U. S.], 248; *Allen v. Newberry*, id., 244; *Brookman v. Hamill*, 43 N. Y., 554, op., 558.)

The referee finds that "the said boat J. K. Post was an ordinary canal boat, without sails or masts, towed by horses, and was designed to navigate the canals of this State." This finding is *prima facie* sufficient to show that the business of the boat was to be wholly engaged in the internal commerce of the State, and therefore contracts relating to repairs and supplies to her, are properly the subject of State regulation, and the law of 1862 is valid as to such a vessel.

But we think the referee committed a fatal error in another respect. The action on the bond is, in effect, a proceeding *in rem*. The boat was seized by the sheriff and in order to procure its discharge from custody, the owner was compelled to enter into the bond on which the action was brought, with sureties, and if there was, in fact, no power or jurisdiction in the county judge, existing in the facts of the case, to authorize the issuing of the warrant and the seizure of the vessel, then the proceedings cannot be upheld, and this action cannot be maintained. (*Vose v. Cockroft*, 44 N. Y., 415, 418.)

The referee finds that the labor performed by the plaintiff and his assignors upon the boat, was performed at the request of J. L. Pierce & Son, and was charged by the plaintiff and his assignors on his and their books of account, to J. L. Pierce & Son. In fact the plaintiff and his assignors were workmen in the employ of Pierce & Son in their dock yard, and, as such, performed labor upon this and other boats indiscriminately as they were directed by Pierce & Son. The contract of Hartson, the owner, for the repairs of the boat was made with J. L. Pierce & Son, and he paid J. L. Pierce & Son in full for all the labor and repairs done on the boat. Pierce & Son might have, by proceeding under the Statute of 1862, obtained a lien against the boat had the owner failed to pay them for the repairs. The following named persons only, can by their contracts, create liens under the act of 1862: (See § 1.) The master, owner, charterer, builder and consignee. Pierce & Son were neither, they were employed by the owner to repair. It cannot be that every hand employed in a boat yard can file a lien on every vessel which the owner of the yard is employed to repair, especially, when the owner has paid for the labor and materials furnished, and

in full for the repairs to the party with whom his contract was made, and thus the owner of the boat be made to pay many times over for the value of the work done and materials furnished. We think this point is fully decided in *Hubbell v. Denison* (20 Wend., 181); *Low v. Austin* (20 N. Y., 181); and *Smith v. Steamer Eastern R. Road* (1 Curtis, 253.)

There existed, then, in the facts of the case, no authority entitling the plaintiff to proceed under the act of 1862, if we are correct in the views above stated, and the conclusion of law of the referee was erroneous and must be reversed.

Judgment reversed and new trial ordered before another referee, costs to abide the event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Ordered accordingly.

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HIRAM LOSSEE, RESPONDENT, v. HALSEY ELLIS AND  
OTHERS, APPELLANTS.

*Agreement not under seal to convey lands — Covenant to stand seized — what consideration must exist for — When a contract is not enforceable by a stranger to the consideration thereof.*

One Lydia J. Noyes, who was the owner of a farm, entered into an agreement with her husband, by which she agreed that her husband should have the use of the farm during his life; that upon his death, if she was then living, she should have the use of it for her life; and after the death of both, she agreed that one, Malvina Noyes, the child of her husband by a former wife, should have all the right and title of the said Lydia therein "in consideration of \$200, in hand paid." The agreement was not sealed.

*Held*, that the instrument purported to be a contract between husband and wife, and was void at law.

That as it was not sealed it could not operate either as a conveyance or a covenant to stand seized.

That, even if it were sealed, it could not operate as a covenant to stand seized for the benefit of Malvina, as it was not founded on a consideration of blood or marriage; and she being a stranger to any pecuniary consideration therein mentioned, could not take advantage of or enforce it.

APPEAL from a judgment in favor of the plaintiff, entered upon a report of a referee, in an action brought for the foreclosure of a mortgage.

*F. W. Hubbard*, for the respondent.

*W. F. Ford*, for the appellants.

TALCOTT, J.:

This is an appeal from a judgment entered in favor of the plaintiff on the report of a referee.

The action is brought by the plaintiff, as the assignee of Lydia J. Noyes, of a bond and mortgage. The defense is, that the bond and mortgage was executed to Lydia J. Noyes as security for part of the purchase-money remaining unpaid on a sale by her of twenty-five acres of land in Jefferson county; and that the said Lydia, at the time of the sale and purchase, represented that she was the absolute owner, in fee simple, of the premises, and that the same were free and clear from incumbrance, which representations, it is alleged, were false and fraudulent, and made with intent to deceive and defraud the mortgagors. And the defendants claim to have the damages, incurred by the mortgagors by means of such false representations, set off or recouped against the amount due by the said bond and mortgage. The mortgagors are in possession of the land, and have never been evicted therefrom, and no attempt has been made to disturb their possession. The said Lydia J. Noyes conveyed with warranty.

The referee, by his findings of fact, negatives the fraud, and does not pass upon the question whether said Lydia J. Noyes had a good title or not; but the defendants insist that the finding of fact that the representations made by Mrs. Noyes were not fraudulent was contrary to the evidence, and that a new trial should be ordered for that cause.

The claim on the part of the defendants is, that, at the time of the conveyance, the said Lydia J. Noyes had only a life estate in the premises. And the following facts were proved, or are claimed by the defendants to have been proved: Lydia J. Noyes held a contract for the purchase of the premises in question from Loren Bush-

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nell, by which it was agreed that, upon the payment of certain sums therein specified, at the times therein stated, Bushnell should convey to the said Lydia J. Noyes, in fee, the premises in question. While she held this contract, and when a portion of this money had been paid by her, she was induced by the solicitation of her then husband, Nathan Noyes, now deceased, to sign an instrument of the following terms, viz. :

“Articles of agreement between Nathan and Lydia Noyes, as follows, viz. : I, Lydia Noyes, agree to let Nathan Noyes have the use and control of my farm, situated in the town of Orleans, in the county of Jefferson, lying between the farm of Joseph M. Beckwith and Columbus Goodrich, containing twenty-five acres, to have the use of it during the life of the said Nathan Noyes, and after his decease, if the said Lydia Noyes is yet living, the use and control of the premises reverts back to her ; and after the death of both of the above-named parties, the said Lydia hereby agrees that Malvina Noyes is to have all the said Lydia's right and title to the same by deed, in consideration of two hundred dollars in hand paid.

“Dated at Orleans the 19th day of June, 1850.

(Signed) “LYDIA J. NOYES.

“In presence of Joseph M. Beckwith.”

The above instrument purports to have been proved by the subscribing witness, before a justice of the peace, on the 1st day of September, 1860, and to have been recorded in the office of the clerk of Jefferson county, in April, 1861.

The Malvina Noyes mentioned in the said instrument, now Malvina Forsyth, is a daughter of Nathan Noyes by a former marriage, and was at the time of the execution of the instrument living with her father and step-mother on the premises in question ; and she testifies that the said instrument was delivered to her by her father and step-mother in the year 1861, when she left home to reside in Chicago. The claim of the defendants is, that the instrument in question created a title in the said Malvina after the lives of Nathan and Lydia J. Noyes, by way of covenant, to stand seized or otherwise, and that, consequently, the title conveyed to the mortgagors by Lydia J. Noyes was defective, and her representations that she had a good and unincumbered title were false and fraudulent.

After the making of the instrument hereinbefore recited, Bushnell, the vendor named in the contract of sale, conveyed the premises to Lydia J. Noyes in pursuance of the agreement.

It is claimed by the defendants that the plaintiff is not a *bona fide* purchaser for value.

The question then arises, whether Malvina Noyes, now Malvina Forsyth, acquired any title to or interest in the premises by virtue of the instrument in question, because, if she did not, then it is wholly immaterial whether the finding as to whether the representations of title, made by Lydia J. Noyes to the mortgagors at the time of the sale and purchase, were fraudulent or not?

The instrument purports to be a contract, by and between parties who were, at the making of it, husband and wife, and, therefore, was wholly void at law. The instrument does not purport to have been sealed; it is, therefore, neither a conveyance, as assumed by the counsel for the appellant, nor a covenant. (1 Rev. Stat. [2d ed.], p. 731, § 137; 4 Kent's Com., 450.)

It could not, in any form, operate as a covenant to stand seized for the benefit of Malvina, because it was not founded on the consideration of blood or marriage. Mrs. Noyes, the supposed grantor, was not connected by blood to Malvina, so that if the instrument of the 19th of June, 1858, had been in form a conveyance, which might have otherwise operated as a covenant to stand seized, it could not have so operated in the present case for want of the requisite consideration. (*Hayes v. Kershow*, 1 Sandf. Ch., 258; *Corwin v. Corwin*, 6 N. Y., 342; *Schott v. Burton*, 13 Barb., 173; *Rogers v. Eagle Fire Ins. Co.*, 9 Wend., 611; 4 Kent's Com., 493.)

At most, and without reference to the fact that the contract was between parties standing in the relation of husband and wife, and, therefore, void, the instrument was nothing more than an agreement to convey to Malvina the remainder by deed. Though the instrument recites a pecuniary consideration, if any was in fact paid, Malvina was a stranger to the consideration, and as to her, it was a mere voluntary agreement to make a future conveyance, of which, specific performance could not be enforced, according to the well-settled principles of courts of equity.

We are, therefore, of the opinion that the finding of the referees on the question of fraudulent intent on the part of Lydia J. Noyes,



is wholly immaterial, and that for aught that appears in the case, Mrs. Noyes was, at the time of the conveyance by her, seized of an absolute estate in fee, in the premises which she conveyed, and to secure a part of the purchase-money unpaid on which, the bond and mortgage held by the plaintiff were given.

The judgment must be affirmed with costs of the appeal to be paid by the appellants.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Ordered accordingly.

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THE PEOPLE OF THE STATE OF NEW YORK *EX REL.*  
THE BOARD OF EDUCATION OF UNION FREE  
SCHOOL DISTRICT NO. 2, TOWN OF ONONDAGA,  
APPELLANT, *v.* JAMES W. HOOPER, SCHOOL COMMISSIONER, ETC., RESPONDENT.

*School commissioner — power of, to alter or divide union free school district — notice as to.*

A School Commissioner has power, under the laws of this State, to alter or divide a Union Free School District.

An order to that effect cannot, however, be made without giving to the trustees of the district a week's notice that at a time and place specified by him he will hear their objections to the proposed alteration.

CERTIORARI to review the action of the respondent, as school commissioner, in making an order dividing Union Free School District No. 2 of the town of Onondaga.

*D. Pratt*, for the relator.

*Fuller & Vann*, for the respondent.

MULLIN, P. J.:

This case comes before us on the return of James W. Hooper, School Commissioner of the second district of Onondaga county,

to a writ of *certiorari* issued upon the application of the Board of Education of the Free School District No. 2 of the town of Onondaga.

An application was made to Commissioner Hooper to divide the Union Free School district, in the town of Onondaga, so as to set off from said district the territory embraced in the village of Danforth, in said town. The commissioner denied the application and an appeal was thereupon taken from the order of the commissioner to the superintendent of public instruction, and he reversed the order and directed the commissioner to proceed and divide the district in conformity to the prayer of the petition delivered to him for that purpose.

In obedience to this order the commissioner, on the 3d July, 1877, convened the board of trustees of said union school district for the purpose of obtaining their consent or refusal to the division of the district and they passed a resolution refusing their consent to the division of the district, five of the trustees voting in favor of the resolution and one against it. On the fifth July the commissioner made and filed with the town clerk an order dividing said union school district and forming a new district from the part set off, which was numbered No. 29, and included the village of Danforth. As the trustees of the union district refused their assent to the division the commissioner directed the division to take effect on the eighth October following. On the same day the commissioner served on the trustees of the union district school a notice that he had made and filed the order above-mentioned, and that he would meet the parties interested in said matter at the school-house in said district on the afternoon of July thirty-first to hear cause why his said order should not take effect, and suggesting to them to request the attendance, at the time and place specified, of the town clerk and supervisor.

After the decision of the appeal from the order of the commissioner refusing to divide said union district, the commissioner applied to the superintendent to reopen the case on said appeal on the ground that the action of the commissioner might have injuriously affected the rights of the trustees of said district. The application was refused, unless within ten days after notice of the decision a supplemental petition was filed in said department by said trustees

showing that their rights had been prejudiced, and giving reasons why a rehearing should be granted. This order was dated 5th July, 1877. A supplemental petition was presented to the department by the trustees of said district, but the prayer of it was refused.

The relator's counsel asks for reversal of the order dividing said school district on two grounds: First. Because the commissioner has no power to divide or alter a union free school district; and, second, that the order of the commissioner was made without giving to the trustees of said district an opportunity to be heard.

It is urged, in support of the first proposition, that the legislature has not conferred on commissioners of schools the power to divide or alter a union school district. That the power is limited to districts other than free school districts; and that the State superintendent has held that districts of the kind last named can be altered only by the legislature, and the legislature has on several occasions passed laws altering the free school districts.

Union free school districts may be formed in any school district in the State by the votes of the inhabitants, and several districts may be consolidated into a single district by the inhabitants of the several districts. When a single district is converted into a union free school district the only effect of the change is to elect a different body of men to manage its affairs, and to enable them to raise by tax, for the support of the school, larger sums than districts not organized as free schools are permitted to raise, and to enable them to organize an academical department. There is nothing in the provisions authorizing the attainment of these objects that interferes with the division of a free school district. It would be exceedingly unwise to forbid the alteration of free school districts, as the same causes must, in the nature of things, operate upon them, rendering alterations necessary, that operate in other districts. Villages spring up in unlooked-for localities, rendering it necessary to erect new school-houses, to change their locations for the convenience of the inhabitants, and no reason is perceived why union free schools should be exempt from the operation of the same causes.

In districts formed of several districts or parts of districts the same considerations present themselves against the wisdom or propriety of prohibiting their alteration. Causes affecting unfavorably the common schools are constantly at work, rendering alterations in

them indispensably necessary. Population changes by deaths and removals; the young grow older and leave the schools, and there may not be others to fill their places — as farmers grow richer they buy up the small farms, and the settler removes to the west. Streams on which mills were erected, and gave support to a considerable population, dry up, and the people look elsewhere for bread. No sane man can disregard these considerations; they must be provided for or public interests must suffer. It is true the legislature has not, in terms, authorized the alteration of union free school districts, nor was it necessary; the power is given in language sufficiently comprehensive to embrace them; and no reason can be assigned why they should not be subject to alteration as the other districts of the State.

Since the amendment of the Constitution forbidding the legislature to pass special laws in cases in which relief can be granted by general laws, school districts cannot be altered by legislation as we have no general laws on the subject. The opinion of the State superintendent is entitled to the highest respect, but superintendents differ in their views of the law as to the power to alter union school districts. The present superintendent has decided in this case that the power exists. I am constrained to concur with him.

By section 4 of title 6 of the Code of Public Instruction the commissioner, when he makes an order altering a school district, is required to give the trustees a week's notice that at a time and place specified by him he will hear their objections to the alteration. After the reversal of the commissioner's decision not to alter the district he served the notice required by the section last mentioned and designating the afternoon of the 31st July, 1877, as the time and the school-house of the district as the place for hearing the parties in opposition to said order. It does not appear that the commissioner or the trustees appeared at the time and place designated, nor that any thing was done in reference to it.

The trustees, as the representatives of the inhabitants, had the right to be heard before the order would become obligatory, and they could not be deprived of that right. Under the presumption of the due performance of official duty we might proceed on the assumption that the commissioner appeared at the time and place designated by him, but the papers before us forbid that assumption.

The commissioner, in his return, says that subsequently to the service of the notice of the order altering the district, on the trustees, and designating a time and place for hearing them in opposition to said order, it was withdrawn by direction of the State superintendent, so that it is conclusively proved that the trustees have never been given an opportunity to be heard as by law they should have been.

Neither the superintendent nor the commissioner could deprive the trustees of this statutory right. (*Fonda v. Canal Appraisers*, 1 Wend., 288; *The People ex rel. Citizens' Gas-light Co. v. The Board of Assessors*, 39 N. Y., 81; *People v. Bd. of Police*, id., 506.)

For this defect in the proceedings the order of the commissioner must be reversed.

The question in relation to the injunction is reserved, until it is definitely decided whether the district shall be divided.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Proceedings reversed.

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CHARLES A. SWEET, APPELLANT, v. THE BUFFALO, NEW YORK AND PHILADELPHIA RAILWAY COMPANY, RESPONDENT.

*Acquisition of fee of land by city — uses to which it may apply it.*

By chapter 547 of 1864, the city of Buffalo was authorized to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore of Lake Erie, and to acquire title in fee to the necessary lands by compulsory proceedings and by conveyances. The act provided that, upon payment or tender to the owner of the compensation awarded for said land, the fee thereof should vest in the city for the said purpose. Subsequently, the defendant, acting in pursuance of a permit from the common council, laid its track upon the said land and used the same for its road. This action of ejectment was brought by the plaintiff, who owned a portion of the land when it was taken by the city, claiming that the city could confer, and the plaintiff acquire, no right to use the land for that purpose; and that, as against defendant, plaintiff was entitled to its possession.

*Held*, that as the fee was vested in the city, and as, under no circumstances, could

the land revert to the plaintiff, he had no greater right to complain of the use of the land by the defendant than any other citizen. That in any event an action in ejectment could not be maintained.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

*A. P. Laning*, for the appellant. The act conferring the power and delegating the right of eminent domain to the city for this specific public use is to be strictly pursued and cannot be extended by implication, or beyond what is expressed, except as necessary to accomplish the purpose for which it was granted; beyond that the statute creating the power is to be strictly construed and limited to the use and purpose expressed. (Potter's Dwarries on Statutes, 257; *Vanhorn v. Dorrance*, 2 Dall., 316; *In re N. Y. and H. R. R. R. Co. v. Kip et al.*, 46 N. Y., 546; *R. and S. S. R. R. Co. v. Davis*, 43 id., 137, 146; *Newell v. Wheeler*, 48 id., 486; *Ex parte Ward*, 52 id., 39.) The word "fee," as used in the act, does not import an estate of inheritance or perpetuity, it is used rather to create an interest, *publici juris*, to continue so long as it is required for that purpose, and to the extent necessary to carry out the intention of the act, being according to the primary definition by Blackstone, "an estate held of a superior." (2 Bl. Com., 105.) The city, under this act, could take what was needful to effectuate this purpose, and the original owner was deprived of nothing more. (*People v. Kearns*, 27 N. Y., 196, 197.) Again, the strict or technical definition of the term "fee" is not to control as to character of the estate created. (2 Rev. Stat., chap. 1, tit. 5, § 2; *Bridges v. Pierson*, 45 N. Y., 604; *Denling v. Rogers*, 22 Wend., 489.) Taking the whole statute together for the purpose of determining what power the legislature intended to confer it is manifest that the city acquired an easement or servitude in the land and not the title, and that it was all that was necessary to be acquired for the purpose of effectuating the object of the statute and is within the exact legal definition of the term, viz.: "A liberty, privilege or advantage in land, without profit, existing distinct from an ownership in the soil." (*Pomeroy v. Mills et al.*, 3 Vt., 208; 1 Crabb's Real Prop., 125, § 115.) The rights to the land thus appropriated when no longer required for the use specified would become abso-

lute in the owner since it is apparent, from a fair construction of the statute, that it was not the intention of the legislature to vest an absolute title in the city by these proceedings, or any title beyond what was necessary for the purpose designated. A greater estate or right in lands cannot be taken for a public use than is declared necessary and is actually applied to it. (*Matter of Albany Street*, 11 Wend., 150, 151; *Matter of Cherry Street*, 19 id., 667; *Barbow v. Townsend*, 1 Mylne & Keene, 506; *Hooker v. W. and N. T. R. Co.*, 12 Wend., 371; *Dunham v. Williams*, 36 Barb., 137.) This statute does not purport to vest the title in the city for ever, but simply for the limited use; and by restraining the power of alienation to the United States for the same purpose raises the implication that it cannot be conveyed to any other person, or for any other use, so that there is a resulting use as to the residue by implication of law in favor of the grantor. (2 Fonbl. Eq. [2d English ed.], 132; 1 id., 439; 4 Kent Com. [5th ed.], 306; 1 Cruise Dig., 399, tit. 11; chap. 4, §§ 20, 32, 34.) The plaintiff having the title to the land in question subject to the right of the city to use it for the purposes of a sea-wall may maintain trespass against any one entering upon it for any other purpose than to construct or maintain the same, or ejectment to recover possession, if acquired for any other purpose, or an action to restrain the use or appropriation of the land by which the owner's right will be impaired or the burden upon his estate increased. (*Williams v. The N. Y. C. R. R. Co.*, 16 N. Y., 97; *Creigh v. R. and B. R. R. Co.*, 37 id., 404; *Brondge v. Warner*, 2 Hill, 145; *Mahone v. N. Y. C. R. R. Co.*, 24 N. Y., 658; *Carpenter v. O. and S. R. R. Co.*, 24 id., 655; *Wager v. Troy Union R. R. Co.*, 25 id., 526; *Lozier v. The N. Y. C. R. R. Co.*, 42 Barb., 465.)

*Sherman S. Rogers*, for the respondent.

MULLIN, P. J. :

In 1864 the legislature passed an act entitled "An act authorizing the common council of the city of Buffalo to lay out a public ground for the purpose of maintaining and protecting a sea-wall or break-water, along the shore or margin of Lake Erie." (Chap. 547 of the Laws of 1864.)

By the first section of said act the common council was authorized to lay out, make and open a public ground in said city for the purposes mentioned in the title of said act, and it was also authorized to acquire title to the strip of land required for such purposes in the same manner as the common council was, by the charter of said city, to acquire lands for laying out streets and highways in said city. The city was also empowered to acquire title to the land by conveyance from the owner. It was provided by the same section that, upon payment or tender to the owner of the compensation awarded for said land, the fee thereof should vest in the city for the purpose aforesaid, and thereafter the said land should remain a public ground for the maintenance and protection of a sea-wall or breakwater. The city acquired title to the strip of land mentioned in the statute for the purposes specified therein. The plaintiff was the owner of said land when proceedings were instituted to acquire title.

In 1874 the common council, by the votes of two-thirds of its members, gave permission to the defendants to lay its track and run its locomotives and cars on and along the piece of ground taken for the breakwater. The defendants, in pursuance of the permission thus granted, laid the track of its road over said strip of land and has ever since run its engines and cars over the same.

In May, 1874, the person owning said premises, at the time the city acquired title thereto, conveyed the same to the plaintiff in this action, who sues to recover possession of said strip of land, on the ground that the city acquired the land for the purpose of a sea-wall to protect the shore of the lake from being washed away by the waters of the lake; and that the defendant could not acquire legal right to lay its track and run its trains over said premises; and that, as against defendant, the plaintiff is the legal owner of the premises, and entitled to the possession. The defendant, in its answer, denied the complaint, and set up, by way of defense, the acquisition of the fee of said land by the city, and a license, by the votes of two-thirds of the members of the common council, for defendant to locate its tracks and run its trains thereon. On the trial at Special Term the facts were agreed upon, and the court ordered judgment dismissing the complaint, and from it the plaintiff appeals.



Chancellor KENT, in his Commentaries (vol. 4, p. 5), speaking of a title in fee, says it is an estate of perpetuity, and confers an unlimited power of alienation, and no person is capable of having a greater estate or interest in land.

When, therefore, the city, by virtue of the proceedings authorized by the act of 1864, acquired the fee of the land for a breakwater, the title of the owner was completely divested, and he had thereafter no other or greater interest in said land than any other citizen of Buffalo. He had no color of title on which to sustain an action of ejectment. The title can in no contingency revert to the original owner or her grantees; and I apprehend that the plaintiff has no greater or better right to complain of the use of the premises by the defendant than has every other inhabitant of the city.

If the plaintiff had the right to insist that the city could not lawfully consent to the use of the premises for any other purpose than that for which it was acquired, that would not entitle him to maintain ejectment.

The judgment should be affirmed, with costs.

Present — MULLIN, P. J., and SMITH, J.; TALCOTT, J., not sitting.

Ordered accordingly.

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THOMAS A. HUNGERFORD, AS RECEIVER, ETC., RESPONDENT,  
v. AARON CARTWRIGHT, WILLIAM H. STRAIGHT  
AND MALINTHA C. STRAIGHT, APPELLANTS.

*Assignment of property, in consideration of a covenant by the assignee to support the assignor — does not constitute a trust.*

This action was brought by the plaintiff, as receiver of one C., appointed in proceedings supplementary to an execution issued upon a judgment recovered against the latter. After the creation of the debt upon which the judgment was recovered, C. entered into a written agreement with one S., his son-in-law, by which he conveyed to S. all his personal property and a contract for the purchase of land, amounting, in all, in value, to about \$2,100; and S. agreed, in consideration thereof to support the said C. during his life, and his minor son until he attained the age of sixteen years, and to send the latter to a common school.

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In this action, brought by plaintiff to annul the transfer, sell the property and pay the debt from the avails, the court held that the transfer was, in fact, an assignment of said property in trust for the use of C., and such trust was void as against the creditors of the latter. *Held*, that this was error.

APPEAL from a judgment in favor of the plaintiff, entered upon the trial of this action by the court without a jury.

*Theo. S. Deam*, for the appellants.

*J. P. Varnum*, for the respondent.

MULLIN, P. J. :

On the 6th July, 1875, M. S. Crabb and the defendant Aaron Cartwright made and delivered their promissory note for \$200 to Brewerton, Gordon & Co., payable three months after date at the First National Bank of Lockport. Crabb was the principal debtor, and Cartwright his surety. A judgment was recovered on this note against the makers, by the payees, on the 18th November, 1875, and an execution thereon duly issued to the sheriff of Monroe county, who returned the same unsatisfied on the 3d December, 1875. Proceedings supplementary to the execution were thereupon commenced against the defendant Cartwright, which resulted in the appointment of plaintiff as receiver of the property of said Cartwright.

It appeared, in the course of the supplementary proceedings, that when Cartwright signed the note he was the owner of a considerable amount of personal property ; and that afterwards, and on or about the 23d August, 1875, he entered into a contract, in writing, with one Wm. H. Straight, his son-in-law, under the hands and seals of both parties, whereby, in consideration of the covenant of Straight to support Cartwright during his life, and his minor son until he attained the age of sixteen years, and send him to the common school, he, Cartwright, conveyed to Straight his property, and released him from certain claims he (C.), had against him. Cartwright also transferred to said Straight a contract for the sale and conveyance of land to one Albert R. Polock. The whole value of property thus conveyed was \$2,100.

The plaintiff, after his appointment as receiver, demanded of

Straight and his wife the property above mentioned, who refused to deliver the same, and then this action was commenced to annul said transfer by Cartwright, and for authority to the plaintiff to sell said property, and out of the avails to pay the judgment above mentioned and the costs of this action.

Straight and his wife were served with process, and they appeared, and, in their answers, they allege that the transaction between Straight and Cartwright was in perfect good faith, and without any intention to defraud C.'s creditors; and they set forth the reasons why they could not be held to be guilty of fraud. He also avers that, before the signing of the note by C., he (Straight) had supported said C. and his minor son, and advanced money for their benefit; and he had supported them after the note was given, and before the assignment by C. to him, all of which was done under and in pursuance of a verbal agreement entered into before the written contract was executed, and which was substantially the same as the written agreement.

Mrs. Straight avers that she had no dealings with C., but that she obtained the land contract from her husband. The defendants also insist, in their answers, that Aaron Cartwright, Jr., should be made a party defendant.

The cause came on for trial at a Special Term in Rochester, and the parties conceding the facts to be substantially as stated above, the court overruled defendants' objections to the maintenance of the action because of the non-joinder of the younger Cartwright.

The counsel for Mrs. Straight moved that the cause be dismissed as to her, on the ground that she was improperly made a defendant. The motion was denied, and defendants' counsel excepted.

The defendants moved for a nonsuit on the grounds:

First. That the facts proved did not constitute a cause of action.

Second. That no trust was expressed or declared by said contract, and plaintiff could not recover under his complaint.

The motion was denied, and defendants' counsel excepted.

The defendants then offered to prove that the contract set forth in the complaint, and the several assignments of property and choses in action were given, and entered into for other considerations than are set out in the contract, and specifically as they were set out in the answer of the defendant Straight, which considerations entered into

and formed a part of the consideration for the contract and assignment. The plaintiff's counsel objected to the evidence. The court sustained the objection and excluded the evidence, and defendants' counsel excepted. The court thereupon held and decided that the contract for support and the transfer of the property must be construed together, and thus construed they constitute an assignment of said property in trust for the use of said C., and that such assignment is void as against the creditors of C., and as against the plaintiff in this action, and he further held that plaintiff was entitled to judgment against the defendants as demanded in the complaint. To the conclusions of law the defendants' counsel excepted.

I regret that the learned judge who tried this cause did not give his reasons for the conclusions of law at which he arrived, as it would enable us the better to comprehend his views, as well in regard to the facts as the law. The respondent's counsel in his points repeats this position taken by the judge, but refers to no authority in support of them.

The contract between Straight and Cartwright is merely an agreement by the former to support the latter and his son, in consideration of the conveyance of the property mentioned in it. The word "trust" is not mentioned in it, nor any language from which the intention to create a trust can be inferred. If this contract between the parties creates a trust, then one is created in every deed of land and every transfer of personal property that is made. I have searched with some care, but am wholly unable to find any authority for holding the contract between the parties to be a trust. And I am persuaded that no case can be found which would authorize this or any other court to appropriate the property conveyed to Straight to the support of C. and his son, or restrain its appropriation to any other use.

The respondent's counsel seems to insist that the transfer to Straight and his wife should be held to create a trust for the benefit of C., because if not so held the judgment creditors could not reach the property in payment of their debt. The creditors would not object to having such an instrument declared to be a trust, provided the property was applied in payment of their debts, but I do not think the argument would be appreciated by any one else.

The return of the execution *nulla bona* was *prima facie* evidence

of insolvency and gave a court of equity jurisdiction to entertain an action to set aside any and all fraudulent transfers by a judgment debtor of his property, and to apply the property fraudulently transferred to the payment of his judgment creditors. Evidence to show that the judgment debtor had property not transferred, sufficient to satisfy the judgment against him, is not competent on the trial of the creditor's suit. If the fact was so the remedy of the debtor was by motion to set aside the return and thus compel the creditors to get a truthful return.

As this case has not been tried on the ground that the conveyance was fraudulent as against the judgment creditor, I will leave the discussion of that question until the case is again tried and the parties are heard in reference to it if they shall so desire. The judgment is reversed and a new trial granted, costs to abide event.

Present—MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment reversed and new trial ordered, costs to abide event.

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MORRIS F. SHEPPARD, PLAINTIFF, v. FRANK EARLES,  
DEFENDANT.

*Sale of property under chattel mortgage — no implied warranty of title arises.*

Upon a sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title of the property so sold is to be implied against the mortgagee.

MOTION for a new trial on exceptions ordered to be heard in the first instance at the General Term, after a verdict in favor of the plaintiff.

*Brown & Wood*, for the plaintiff. The defendant, in selling the horse to the plaintiff, must be held to have warranted the title. (*Defreeze v. Trumper*, 1 Johns., 274; *McCoy et al. v. Archer*, 3 Barb., 323.) It is immaterial even if buyer have notice of a prior claim, as for instance a levy. He may purchase and rely on the

warranty. (*Dresser v. Ainsworth*, 9 Barb., 619; opinion of Justice WELLES, 625; Story on Contracts, §§ 832, 833, and note.) The plaintiff having alleged and proved his special damage, *i. e.*, the action against him, the notice to defendant and his failure to defend, the recovery against him and his own costs and expenses in the defense, is entitled to judgment for the full amount of the recovery and his expenses. (*Brewster v. Countryman*, 12 Wend., 446; *Dela-ware Bank v. Jarvis*, 20 N. Y., 226; *Whitney v. National Bank*, 45 *id.*, 303.)

*D. B. Prosser*, for the defendant. The rule of implied warranty is founded upon the ground that a party in the possession of personal property, and selling it as his own, is bound to know the source of his title, and whether he is the owner or not. (*Hoe et al. v. Sanborn*, 21 N. Y., 552.) Unless the party selling is in the possession, it is well settled that there can be no implied warranty. (*McCoy et al. v. Archer*, 3 Barb., 323; *Edick v. Crim*, 10 *id.*, 445; *Scranton et al. v. Clark*, 39 N. Y., 220.) The most that the plaintiff would have been entitled to recover, even if there could be a warranty implied, was the sum of sixty-five dollars and fifty cents, paid by him to the defendant, and the interest and costs. It has been frequently held that the warranty of the title of personal property was similar to the covenant for quiet enjoyment. Under such a covenant the plaintiff can recover only the sum paid, with interest and costs. (*McCoy v. Archer*, 3 Barb., 323; *Rew v. Barber*, 3 Cowen, 286; *Burt v. Dewey*, 40 N. Y., 283; S. C., 31 Barb., 540; *Sweetman v. Prince*, 36 N. Y., 224, page 233 at the end of the opinion.)

MULLIN, P. J. :

This action is brought to recover of the defendant damages for a breach of warranty of the title to a horse, sold by the defendant upon a chattel mortgage given to the plaintiff by John O'Neil, to secure the payment of fifty dollars on the first of October next after date of said mortgage. The mortgage was dated 14th April, 1875, and was upon a pair of horses and a wagon.

When the debt became due it was not paid, and defendant delivered the mortgage to one Payneer to get the money upon it, and if

not paid to sell the mortgaged property. On the 27th December, 1875, the debt not having been paid, Payneer took possession of one of the horses and sold it at public auction to the plaintiff, who was the highest bidder, and he paid the purchase-money. Soon after the sale, Catharine O'Neil claimed that the horse sold was hers, and she sued the plaintiff and recovered judgment against him for the value of the horse, together with costs of the action.

The plaintiff then brought this action, and on the trial the court directed a verdict in favor of the plaintiff for the amount of the judgment recovered against him by Mrs. O'Neill and the costs paid by him to his own counsel for defending the action. It appeared upon the trial that the plaintiff, after the action was brought against him, gave notice of that fact to the defendant and requested him to defend the action. This the defendant refused to do. A witness for the defendant testified that during the sale, and before the horse was struck off to the plaintiff, he informed the plaintiff that Mrs. O'Neil claimed the horse to be her property and that she was going to sue for it. The plaintiff was examined as a witness in his own behalf, and denied that he was informed, before the horse was struck off to him, of the claim of Mrs. O'Neil.

It is well settled that on a sale of personal property by a person in possession a warranty of title is implied. (1 Wait's L. and P., 530; *McCoy v. Archer*, 3 Barb., 323; *Scranton v. Clark*, 39 id., 273; *Defreeze v. Tremper*, 1 Johns., 274.) But when the sale is made by an officer or trustee no warranty of title is implied. (1 Chitty on Con., 626, note 10.) It seems to me that a warranty of title of property sold by virtue of a chattel mortgage should not be implied against the mortgagee. The proceeding is notice to the public that he is not selling his own title to the property, but the title he acquired through the mortgage. (*Rudderow v. Huntington*, 3 Sandf., 252.) If I am right in this, the recovery against defendant for the costs of the suit brought by Mrs. O'Neil was illegal.

New trial granted, costs to abide event.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

New trial ordered, costs to abide the event.

IRENA M. WARNER, ADMINISTRATRIX, ETC., OF JOEL B  
WARNER, DECEASED, APPELLANT, v. MARIA MILLER  
RESPONDENT.

*Repairs to boat — liability of owner for — when credit given to captain.*

Plaintiff's intestate made repairs upon a canal boat owned by the defendant, in pursuance of orders received from the captain of the boat. Subsequently, the captain paid to the plaintiff a portion of the bill, and gave his note for the balance. The plaintiff, without returning the note, brought this action after its maturity against the defendant.

*Held*, that the acceptance of the note of the captain, without explanation, was sufficient to show that the credit was given to him, and not to the owner, and that plaintiff could not recover.

APPEAL from a judgment in favor of the defendant, entered upon the trial of this action by the court without a jury.

*S. N. Dada*, for the appellant.

*Pardee & Piper*, for the respondent.

MULLIN, P. J. :

In August, 1874, the defendant was owner of the canal boat "E. S. Pardee," of Fulton. Jerome E. Miller, the defendant's husband, was the master of said boat. By the direction of the captain, plaintiff's intestate made repairs on said boat to the amount of seventy dollars and sixty-three cents.

In December, 1874, the captain paid to the plaintiff, the administratrix of the estate of her late husband, twenty-five dollars upon said bill and gave his note for forty-five dollars and sixty-three cents, the balance of said bill, payable eight months after date with interest. Plaintiff held said note at the time of the trial and no part of it has been paid.

This action is brought to recover of the defendant the amount of the unpaid balance of the repairs. The cause was tried by the court, without a jury, who found the foregoing facts and ordered judgment in favor of the defendant dismissing plaintiff's complaint.



From the judgment entered pursuant to the direction of the court the plaintiff appeals.

The defendant was owner of the boat and as such was liable for repairs made upon her by direction of the captain. (Abbott on Shipping, 132 and notes, and cases cited.) When it is shown, however, that the repairs were made on the credit of the captain alone the owner is not liable. (*Cox v. Reid*, 12 E. C. L., 342; *Baker v. Buckle*, 17 id., 515; *Jennings v. Griffiths*, 21 id., 700; *James v. Bizby*, 11 Mass., 34.) And taking the note of the captain for the amount of the repairs is sufficient evidence of that fact. (Abbott on Shipping, 133, note 111, and cases cited.) The note in such case is not considered as payment of the debt so as thereby to discharge the owner, but solely as evidence that the work was not done on the credit of the owner.

The judgment must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

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HIRAM LOSSEE, APPELLANT, v. HALSEY ELLIS AND OTHERS,  
RESPONDENTS.

*Action to foreclose mortgage—costs—error of referee as to—how corrected.*

In an action to foreclose a mortgage the costs are in the discretion of the court. Where a referee in such a case decides that the plaintiff is only entitled to certain costs, his error, if any, can only be corrected by an appeal from the judgment, and not upon a motion.

APPEAL by the plaintiff from two orders made at a Special Term of this court, one of which denied plaintiff's motion for a retaxation and further allowance of costs in said action, and the other of which granted defendants' motion for a retaxation and reduction of costs.

*F. W. Hubbard*, for the appellant.

*W. F. Ford*, for the respondents.

MULLIN, P. J.:

The plaintiff brought an action to foreclose a mortgage; the defendants, or some of them, appeared and answered.

The issues were referred for trial to a referee, who, after hearing the proofs and allegations of the parties, ordered judgment of foreclosure and sale in favor of the plaintiff, with costs from the time one of the defendants was brought in, which was after the issue was joined as to the other defendants.

The plaintiff's counsel made out and served a full bill of costs in behalf of the plaintiff and presented it to the clerk of Jefferson county for adjustment.

The defendants' counsel appeared on the taxation and objected to the allowance of the following items in said bill, viz.:

Allowance under section 308 of the Code in force prior	
to September 1, 1877 .....	\$47 93
Term fees, April and June.....	20 00
Drawing interrogatories to annex to commission.....	10 00
	<hr/>
	\$77 93
	<hr/>

By the moving affidavit, it appears that defendants' counsel objected to these items as not admissible under the decision of the referee, and the clerk rejected them on that ground.

The plaintiff's counsel then moved, at a Special Term, for a readjustment of said costs and the allowance of the items thus rejected. The motion was denied and plaintiff appeals.

At the taxation, the clerk allowed to the plaintiff the following items charged in plaintiff's bill of costs, viz.:

Costs before notice of trial.....	\$25 00
Costs after notice of trial.....	15 00
Three additional defendants served.....	6 00
	<hr/>
	\$46 00
	<hr/>

The defendants' counsel moved, at Special Term, for a readjustment and disallowance of these items, on the ground they were not allowable under the judgment of the referee.

After hearing the counsel for the parties the court ordered a readjustment of the costs and the disallowance to plaintiff of fifteen dollars, being the amount charged as costs after notice of trial. From both these orders plaintiff appeals.

It has been repeatedly held that in actions for the foreclosure of mortgages the costs are in the discretion of the court. (*Morris v. Wheeler*, 45 N. Y., 708; *Pratt v. Ramsdell*, 16 How. Pr., 59; *Bartow v. Cleveland*, 16 How., 364; Code, § 306.)

The counsel for the plaintiff refers us to *Hunt v. Chapman* (51 N. Y., 555) as overruling this proposition, and holding the plaintiff, if he recovers a judgment, entitled to costs and that they are not in the discretion of the court. I do not understand the case as deciding any such proposition. Had it been the intention of the Court of Appeals to overturn a rule of law that has been in force for so long a time and so uniformly acted upon it would have been quite likely to have said so in unequivocal terms. The question in the case cited was whether the defendant was entitled to have a counter-claim allowed in an action for foreclosure, and it was held that it could be, as an action of foreclosure was an action on a contract within section 150 of the Code. This comes far short of holding that in such an action the plaintiff, if he recovers, is entitled to costs as a matter of course.

If these costs are in the discretion of the court the referee, in the exercise of it, held and decided that the plaintiff was not entitled to them until after one of the defendants was brought in, and that was after the trial was commenced at Special Term. The clerk was bound to conform to the judgment in the adjustment of the costs in the cause, and having refused to do it, the judge at Special Term was right in setting it aside and disallowing costs not in conformity to the judgment.

If the plaintiff was right in his position that he was entitled to the whole costs in the cause, notwithstanding the decision of the referee, the error could not be corrected by motion. The costs were part of the relief granted in the cause, and any error in the relief could only be reached by appeal from the judgment. (*Clarke v. City of Rochester*, 34 N. Y., 355; *McGregor v. McGregor*, 32 id., 479.)

The orders of the Special Term are affirmed, with ten dollars costs, and disbursements in one appeal only.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Orders of Special Term affirmed, with ten dollars costs, and disbursements in one appeal only.

EDWARD DRAKE, RESPONDENT, v. WILFRED W. PORTER  
AND THOMAS C. BASSETT, APPELLANTS.

*Undertaking — by continuing partner to secure payment of firm liability — what covered by — what constitutes a payment.*

The plaintiff, upon dissolving a partnership, conveyed all the assets to the continuing partner, Thompson, who, having agreed to pay and discharge all firm liability, gave to the plaintiff a bond, signed by himself and the defendants, as sureties, conditioned to pay all the debts and liabilities owing by the firm, due or to become due, and to save plaintiff harmless from the payment of any and all firm debts and liabilities, of every name and nature, then owing by them. Subsequently, actions were commenced against the plaintiff and Thompson upon certain notes given by the firm. The summons was served upon Thompson alone, who engaged an attorney to appear for both, and who suffered judgment to go by default. Plaintiff, having obtained leave to open the judgment, defended the action and procured the complaint to be dismissed. This action was brought to recover the amount paid to plaintiff's attorneys for their services in defending the action, plaintiff having given his promissory note to them for the amount, which was accepted by them in payment thereof. *Held*, that the attorneys having accepted plaintiff's notes in payment of their bill, he was entitled to recover the amount as money actually paid by him; That the amount so paid was within the condition of the bond, and that the sureties were liable therefor.

APPEAL from judgment in favor of the plaintiff entered on the report of a referee.

On the 8th January, 1870, the plaintiff and Mark V. Thompson became copartners in the city of Syracuse in the stove business. This firm succeeded that of Drake & Wells who had previously carried on business at the same place, Thompson taking the place and assuming the responsibilities of Wells, who retired from the business.

In 1872 a disagreement arose between Drake and Thompson, in reference to their partnership matters, and one Bassett was appointed receiver of the property and effects of said firm.

On the 28th of April, 1872, an agreement in writing was entered into between said Drake and Thompson, whereby it was, amongst other things, stipulated and agreed that an inventory should be made of the property of said firm at cost price, and that whichever

should offer most for the property of said firm should have it, and the other party should sell to him his interest in said property. It was further agreed in and by said written agreement, that the partner who purchased should assume all the partnership debts and release the retiring partner therefrom.

An inventory had been made by the receiver of the property of said firm in March, 1872, and on the twenty-eighth of April it was agreed that the inventory thus taken should be accepted in place of the one agreed to be made in the contract of the twentieth-eighth of April above mentioned, and that any consideration of over or under estimate in the March inventory, or in transactions subsequent to said inventory, should be covered by the offers of said partners, according to the terms of said contract for the retention and disposal of their respective interest in the concern.

Thompson subsequently became the owner of the partnership effects at a price mutually agreed upon, and he agreed with Drake to give him, in consideration of such purchase, a bond of indemnity under the hands and seals of the defendants, dated 26th day of April, 1872, with a condition that if said Thompson, his heirs and assigns, etc., should pay or cause to be paid all the firm debts and liabilities of every name and nature then owing by the firm of Drake & Thompson on their partnership accounts due or to become due, or in any wise connected with the business of said firm, and save Drake harmless from the payment of any and all firm debts and liabilities of every name and nature then owing by them in any manner whatever, then the said obligation to be void, otherwise to remain in force.

During the existence of said firm of Drake & Thompson they purchased of one Hinman an interest in a patent-right, for which they gave five notes of said firm of \$100 each, dated 23d July, 1870, and payable in six, nine, twelve, eighteen and twenty-four months from date. At the time of the purchase by Thompson of Drake's interest in the copartnership assets, and at the time the bond was given by the defendants to Drake, these notes were held by said Hinman; nothing had then been paid on them. These notes were not included amongst the liabilities of the firm, because the partners believed that they were not valid obligations against said firm, as the patent proved to be worthless.

On or about the 1st September, 1872, Hinman commenced an action on said notes against the members of said firm, the summons being served on Thompson alone, who employed an attorney to appear and defend for both. The attorney did appear and defend the said action for both.

A judgment was taken by default against both for the whole of said notes, together with the interest thereon and the costs of the action. Drake, after the recovery of the judgment, caused notice of the levy of the execution on said judgment upon his property to be served on the sureties in said bond, and that he would hold them responsible upon said bond for such sum as he should be required to pay upon said judgment. The sureties paid no attention to said notice. Drake thereupon moved to be let in to defend said action, and the motion was granted and he thereupon put in an answer, and the cause was tried in June, 1874, and the complaint was dismissed, with costs.

The attorneys employed to obtain leave to defend said action, and who defended it, brought in a bill against Drake for their services for \$318.93, and for which Drake gave the said attorneys his note, which was taken in payment of said indebtedness before this action was commenced.

This action was brought to recover the amount so paid as aforesaid to the attorneys for the defense of said action, with another claim that was rejected by the referee, and as to which no question arises on this appeal. The defendants, Porter and Bassett, appeared; the defendant Thompson did not appear.

The answer contained, first, a general denial of the allegations in the complaint; second, that before the defendants executed said bond, the plaintiff represented to them that the inventory of their liabilities contained a full and complete statement of all debts due by the said firm of Drake & Thompson, and that there was no claim against said firm upon said notes given for the patent-right, and that defendants, relying on said statement, executed said bond, and insist that the plaintiff is estopped from setting up any claim not contained in said inventory; third, that the representation by Drake that the inventory contained all the liabilities of said firm was false and fraudulent and made with a view to deceive and defraud said defendants, and that they have sustained damages, by

reason of such false and fraudulent representations, to the amount of \$500, which they insist upon by way of recoupment against the claim of said plaintiff.

The referee found the facts as hereinbefore stated, and ordered judgment in favor of the plaintiff for the sum of \$355.27, together with the costs of the action.

*George N. Kennedy*, for the appellants.

*Irving G. Vann*, for the respondent.

MULLIN, P. J. :

The bond on which this action is brought is dated the 26th April, 1872. The plaintiff did not give his note for the costs, which he seeks to recover of the defendants, until just before this action was commenced, which was in April, 1875. It follows that the claims in suit accrued subsequent to the execution of the bond.

The condition of the bond is, that the obligors should pay, or cause to be paid, all the firm debts or liabilities now (that is on the 26th April, 1872) owing by Drake & Thompson on their joint partnership accounts, due or to become due, or in anywise connected with the business of said firm, and save Drake harmless from the payment of any and all firm debts and liabilities, of every name and nature, now owing by them in any manner whatever.

Without stopping to inquire whether the defendants are liable on the clause of the condition by which they agree to pay the debts due and owing by the firm of Drake & Thompson, I propose to consider the question of their liability on the indemnity clause of the condition. The costs of Fuller & Vann, the attorneys who procured the order of the court allowing the plaintiff to appear and answer in the action after judgment had been entered against both the partners on the patent-right notes, and who subsequently defended the action and nonsuited the plaintiff, were not a debt due by the firm of Drake & Thompson at the time the bond was given, but it became a debt due by them when the judgment of nonsuit was entered on the 16th June, 1874. To entitle the obligee in an indemnity bond to recover costs of actions brought against

him for the recovery of copartnership liabilities, he must show that he has paid them, or been in some way damnified thereby.

In *Churchill v. Hunt* (3 Den., 321), it was held that, upon a bond conditioned to save harmless and indemnify the obligee against his liability as maker of a note held by a third person, and to pay the same or cause it to be paid, the obligee may, without having paid any thing, recover the amount of the notes against the obligor upon his failure to pay the holder, but he cannot recover the costs of a judgment obtained against him on the notes when he has not paid them.

The costs of Fuller & Vann were due from the firm, and if the plaintiff has paid it, he is entitled to recover.

In the following cases it has been held that the obligee in an indemnity bond was entitled to recover on the bond when he had given to a creditor of the firm a promissory note for the demand, which the creditor agreed to receive in payment of his claim against the firm of which the plaintiff was a partner: *Witherby v. Mann* (11 Johns., 518); *Rodman v. Hedden* (10 Wend., 498); *Howe v. Buffalo, New York and Erie Railroad Company* (37 N. Y., 297); *Doolittle v. Dwight* (2 Met., 561); *Lee v. Clark* (1 Hill, 56).

The referee was right in holding that plaintiff had paid the costs so as to entitle him to recover.

The appellants' counsel moved for a nonsuit at the Circuit, and asks for a reversal of the judgment by this court on the ground that the costs sought to be recovered were not a debt against the firm at the time the bond was given. The bond does, in terms, provide that the obligors shall pay the debts of the firm *now* (at the date of the bond) due or to become due.

If the obligors had paid the debts claimed to be due from the firm, the bill of costs in controversy would never have accrued; and it comes with a bad grace from the defendants to refuse to pay the costs occasioned by their own breach of the conditions of the bond. It is true the partners, by defending the action, defeated a recovery on the patent-right notes, and they should the more cheerfully pay the costs incurred in the defense of the action.

The referee was right in holding that plaintiff was not chargeable with fraud in telling, at or before they signed the bond, that the patent-right notes were not a valid claim against the firm. He



declared to them the facts relating to the notes, and the action brought to enforce them, and gave it as his opinion that the firm was not liable on the notes.

The defendants had the same means that plaintiff had to determine the question of liability, and was as competent to form an opinion as to the legal liability of those who should become sureties on the bond.

The judgment must be affirmed.

Present — MULLIN, P. J., TALCOTT and SMITH, JJ.

Judgment affirmed.

# MEMORANDA

OF

## CASES NOT REPORTED IN FULL.

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JOSEPH PRATT, PLAINTIFF IN ERROR, *v.* THE PEOPLE OF  
THE STATE OF NEW YORK, DEFENDANTS IN ERROR.

*Purpresture — order laying out highway — record of, how impeached — The survey —  
must be incorporated into the order.*

THE plaintiff in error was indicted in the Jefferson county Oyer and Terminer for unlawfully obstructing a public highway, or street, in the village of Carthage in said county. Having been convicted and sentenced in the Court of Sessions, to which the indictment was sent, he sued out a writ of error and removed the record into this court.

The highway in question commenced in the margin of Furnace street, in said village, near the terminus of Water street, and after crossing a pond that separated an island in the Black river on which a saw-mill, now owned by the plaintiff in error, and a grist and saw-mill of one Guyot stood, from the main land it extended to a point near the grist-mill of said Guyot; a bridge was constructed by the commissioner of highways of the town of Wilna, in which said village of Carthage is located, over said pond.

The plaintiff in error erected an office and barn within the limits of the said highway and piled logs and lumber therein, and these constituted the obstructions in the highway for which the indictment was found.

To prove that the *locus in quo* was a public highway the district attorney proved that in August, 1858, Sanford Lewis, Wm. D. Levis and Charles Sarvoy were commissioners of highways of the town of Wilna, and that a paper produced had been taken from the

office of the town clerk of said town and that the signatures to said paper were in the handwriting of said commissioners.

The paper thus produced is marked as filed February 1, 1859, in the handwriting of the then town clerk of said town. The following is a copy of the contents of said paper, viz. :

"A survey of a road or street from Furnace street to Guyots & Davis Mills, beginning at a hub on the northerly margin of Furnace St. 25 links easterly from the point where the easterly margin of Water street intersects with the northerly margin of Furnace street, thence in a direct line towards the S. Ely corner of Guyot's grist-mill N.  $45\frac{1}{2}$  west 2 chs 21 lks to a hub 57 lks S.  $45\frac{1}{2}$  E. from said S. Ely corner of said grist-mill as surveyed by A. Brown, August 30th, 1858.

The above street is to be three rods wide.

(Signed.)

SANFORD LEWIS,

WM. D. LEVIS,

CHARLES SARVOY,

*Commissioners of Highways."*

The signatures are not on the same paper as the survey, but upon a piece of somewhat different color and of inferior quality and annexed to the survey by three wafers.

Upon the trial two of the commissioners were called and gave evidence tending to show that they had never signed the paper when attached to the survey, and had never authorized it to be so attached, and that no meeting had ever been called to lay out the highway, and that in fact it never had been laid out. Plaintiff's counsel claimed that their testimony in connection with the appearance of the paper was sufficient to impeach it as a record, and that there was, therefore, no evidence to show that the *locus in quo* was a public highway. The trial court held the paper sufficient to show that the highway had been laid out.

The court at General Term said: "Assuming that the paper found on the files of the town clerk was presumptive evidence of the laying out of the highway in question, it was but presumptive evidence and it was competent for any person interested to prove that it was not legally laid out and thus overcome the presumption.

First. The appearance of the paper was some evidence against its

genuineness. The names of the commissioners were signed, not upon the same paper on which the survey was written, although there was ample room on the back of it for the names of the commissioners. The paper on which the names were written was of a somewhat different color from that on which the survey was written, and was of an inferior quality and was annexed to the survey with wafers.

Second. One of the commissioners swears positively that he never saw or heard of the survey until the day before the trial of the plaintiff in error upon the indictment, and that, although his signature to the paper is genuine, he never signed it connected with the survey, and never attended a meeting of the commissioners when an order for laying out the highway was made.

Another of the commissioners cannot swear positively that he did not sign the paper when annexed to the survey, but has no recollection of ever signing it, and his recollection is that he did not. The third commissioner was not sworn, and we do not know what his recollection in regard to signing it is. But upon the evidence given on the trial it seems to me that the presumption is entirely overcome, and the finding of the jury that the paper relied upon was an order laying out the highway was without evidence to support it.

The only question remaining to be considered is whether the paper, Exhibit A, was a valid order for laying out the road.

If I am right in holding that the verdict finding the exhibit to have been properly made and filed was not only not supported by the evidence but against it, the invalidity of the order is conclusively established. But if I am wrong in this I am of opinion that it is invalid as not being made in compliance with section 70, 2 Revised Statutes(5th ed.), 394, which section is in the words following, viz. :

‘Whenever the commissioners of highways shall *lay out*, alter or discontinue any road, either upon application to them or otherwise, they shall cause a survey to be made of such road, and shall incorporate such survey in an order to be signed by them and to be filed and recorded in the office of the town clerk, who shall note the time of recording the same.’

The survey was not incorporated in an order signed by the commissioners, and hence the requirement of the statute has never been

complied with. The proper protection of the public as well as of the owners or occupants of the land over which a highway is laid out requires that the commissioners should clearly designate the route of the road, its width and the determination that the road be laid out. The legislature, therefore, required a survey and an order signed by the commissioners, and that it be filed and made a matter of record so as to enable those interested to establish the existence of the road by the highest evidence the subject-matter was capable of being established by. If the order might be omitted so might the survey, and thus the public left to ascertain the existence of the road by the evidence of persons cognizant of the action of the commissioners in reference to the road. I entertain no doubt but that the omission to incorporate the survey in an order was fatal to the laying out of the road.

We have been referred to the case of *Tucker v. Rankin* (15 Barb., 471) in which it was held that a survey of a road signed by the commissioners was a valid order laying out the road. The case arose in the seventh judicial district, and the appeal was heard and decided in the General Term of the district. One of the judges sitting in the General Term dissented from the conclusion at which the majority arrived as to the validity of the order, together with other questions. The dissenting opinion of Johnson, J., is, to my mind, conclusive against the validity of the order. The decision of the case operates as a virtual judicial repeal of the most important clause of the section cited, and is not only mischievous in its effects upon the public but fatal to the action of the public authorities in their efforts to lay out and protect the roads of their towns and the streets of their villages and cities. Although I entertain the most profound respect for the learning and ability of the judges who decided the case cited, I cannot concur with them in the conclusion at which they arrived and am constrained to disregard it.

ALLEN, J., when sitting in the General Term in the fifth district in the case of *Stewart v. Wallis* (30 Barb., 348), referring to one of the propositions decided in *Tucker v. Rankin*, says 'the reasons for the judgment in the former case (*Fitch v. Comrs. of Kirkland*, 22 Wend., 132) are more satisfactory to me than those of the able

judge pronouncing the opinion of the court in the latter (*Tucker v. Rankin*), and, therefore, I prefer to follow the first decision.'

PORTER, J., in *The People v. Williams* (36 N. Y., 443), referring to the case of *Tucker v. Rankin*, says the decision is in conflict with previous and subsequent adjudications of the court in which it was pronounced, and it has since been substantially overruled in this court.

There are other cases in which the rulings in *Tucker v. Rankin* have been repudiated, but not upon the specific point now under consideration. It seems to me that the case cannot be considered as binding authority upon any of the questions considered by the majority of the judges.

The conviction should be reversed, and as an order laying out the road cannot now be supplied the prisoner should be discharged."

*Stephen R. Pratt*, for the plaintiff in error. *Watson M. Rogers*, for the defendant in error.

Opinion by MULLIN, P. J.; TALCOTT and SMITH, JJ., concurred on the ground that the record of the highway was impeached.

Conviction reversed and proceedings remitted to General Sessions of Jefferson county with directions for a new trial.

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FRANKLIN FITCH, APPELLANT, v. THE BUFFALO, NEW YORK AND PHILADELPHIA RAILROAD COMPANY, RESPONDENT.

*Negligence—turning cows on to highway crossed by railroad track.*

APPEAL from a judgment of the Cattaraugus County Court reversing a judgment in favor of plaintiff, rendered in a Justice's Court.

The action was brought to recover damages for negligently killing plaintiff's cows at a highway crossing.

It appeared by the uncontradicted evidence of the plaintiff's witness, his hired man, Hale, that after the cows were milked in the evening he turned them (forty-nine in number) into the high-

way leading across defendant's track to the pasture, and allowed them to go at large in the highway, unattended; that it was his business to drive them to the pasture; that half an hour afterwards he started after them, and, soon hearing a train pass, found three of them killed.

The court at General Term said: "Voluntarily turning the cows into the highway, and permitting them to go on to the railroad without any person to take care of them, was clear negligence on the part of the servant, which prevents the plaintiff from recovering, or rather it brings him within the principle *voluntati non fit injuria*. (*Corwin v. The N. Y. and Erie R. R. Co.*, 3 Kern., 42, per MARVIN, J., p. 49.)"

*Alfred Spring*, for the appellant. *C. S. Cary*, for the respondent.

Opinion by SMITH, J.; MULLIN, P. J., and TALCOTT, J., concurred.

Judgment of the County Court affirmed.

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NELLIE RIDER, RESPONDENT, v. JAMES FULLER, APPELLANT.

*False imprisonment—confining person supposed to have small-pox—delivery of, to hospital ambulance—injury subsequently received in ambulance and hospital—evidence of, not admissible on question of damages in action for the prior confinement.*

APPEAL from a judgment entered on a verdict rendered at the Onondaga Circuit, and also from an order denying a motion for a new trial on the minutes.

The action was brought to recover damages for false imprisonment, and a verdict was rendered for plaintiff for \$500.

The plaintiff testified that she went to defendant's office to be examined, and that after she had been examined by the defendant and two other physicians, the defendant pronounced her case one of small-pox, and told her she must stay in the office until the ambulance wagon came to take her to the hospital, and that if she left before it came they would lock her up. The court, at General Term, after commenting upon the evidence, and stating that, in view of all the evidence bearing upon the main question, the verdict would

have been more satisfactory if it had been for the defendant, but that it was not prepared to say that it was so clearly and decidedly against the weight of evidence as that it should be set aside for that reason, proceed :

“ We are of the opinion, however, that the judge fell into an error in admitting testimony against the defendant’s objection and exception, tending to show that the driver of the ambulance, instead of going directly to the hospital, deviated from his course, and took in a colored man affected with the small-pox, and carried him with the plaintiff to the hospital, and also evidence tending to show that when the plaintiff left the hospital, part of her clothing was detained there by some person in charge. The testimony was probably received upon the question of damages, and it is to be presumed from the amount of the verdict that it had an effect upon the jury. The facts which the testimony tended to establish were not the legal and natural consequences arising from the tort. The defendant was not responsible for the tortious acts of the driver of the ambulance, or of the keepers of the hospital, against each of whom the plaintiff has a cause of action for any injury which they wrongfully caused her. The driver and the hospital keeper were not the servants of the defendant. If the driver, by his negligence, had upset the ambulance, whereby the plaintiff’s bones had been broken, or if the keeper of the pest-house had beaten her, no one will contend that the defendant would have been liable therefor. The injuries supposed differ only in degree from those which the plaintiff was allowed to prove in aggravation of damages. The damages must proceed wholly and exclusively from the injury complained of. (*Vicars v. Wilcocks*, 8 East, 1 ; *Lock v. Ashton*, 12 Ad. & El. [N. S.], 871 ; *Crain v. Petrie*, 6 Hill, 522.) There is no evidence that the defendant acted maliciously ; on the contrary, it is apparent that his only motive was to prevent a spread of the contagious disease with which he believed the plaintiff was attacked, and to put her in the way of being properly treated and cared for. Not having pleaded a justification, he was not permitted to show that he acted by authority, and he was therefore technically liable, but he should not be held to any thing more than compensation for the legal and proximate consequences of his own acts, so long as he acted in good faith.”



FOURTH DEPARTMENT, APRIL TERM, 1878.

*I. T. Vann*, for the appellant. *D. Pratt*, for the respondent.

Opinion by SMITH, J. ; MULLIN, P. J., and TALCOTT, J., concurred.

Judgment and order reversed and new trial ordered, costs to abide event.

WILLIAM SMITH, RESPONDENT, v. WILLIAM TIFFANY,  
IMPLEADED, ETC., APPELLANT.13 671  
41ap206*Receiver of rents, etc., of mortgaged premises — what persons in possession may object to his appointment.*

APPEAL from an order of the Special Term of Lewis county appointing a receiver in a foreclosure suit.

The defendant Tiffany alone resisted the motion, which was made after a judgment had been rendered in a foreclosure suit, from which judgment the defendant Tiffany had appealed without giving any security to stay the proceedings.

After overruling certain objections raised by Tiffany, the court at General Term proceeded: "Tiffany also objects to the appointment of a receiver, on the ground that he is not in the possession of the mortgaged premises, and that those in possession were not notified of the application for a receiver, and were not parties to the suit.

In his affidavit containing this allegation he wholly omits to mention the names of any such persons, or to set forth the title under which they claim, or to describe the portion of the mortgaged premises of which they are in possession, and the whole allegation is upon information and belief. The premises consist of one lot in the outskirts of the city of Oswego, fifty feet front, and 130 feet deep. Tiffany's affidavit was made in Oswego, and admits that some part of the mortgaged premises is in the possession of the other parties, defendants, who have made default, and therefore require no notice. Under the circumstances, the omission to mention the names of the other parties in possession, or to disclose the title or rights they claim, the objection cannot be considered as setting up any valid reason for not granting the motion.

The premises are admitted to be an inadequate security for the money due on the mortgage, and Tiffany insolvent. The mortgage debt is all due. In such cases it is an equitable right of the mortgagee to have a receiver of the rents and profits of the mortgaged premises, even after a decree. (*Astor v. Turner*, 11 Paige, 436.)

In that case a receiver was appointed after decree and sale, but where the purchaser could not, by the practice of the court, obtain possession till after the lapse of time to have the sale confirmed. (See, also, *Syracuse Bank v. Tallman et al.*, 31 Barb., 201.)

If any persons, not parties to the suit, are in possession, who have not come in since the filing of notice of *lis pendens*, they are, if they have any rights at all, presumptively the tenants of defendant Tiffany, the owner of the equity of redemption, and may be required to attorn and pay rent to the receiver; or may be heard at the Special Term for the purpose of obtaining a modification of the order appointing a receiver, upon disclosing any right or title which would show that the receiver ought not to be permitted to deprive them of their possession. (*Sea Ins. Co. v. Stebbins and others*, 8 Paige, 565.)"

*Wm. Tiffany*, appellant, in person. *W. C. Prescott*, for the respondent.

Opinion by TALCOTT, P. J.

Present — TALCOTT, P. J., SMITH and HARDIN, JJ.

Order appealed from affirmed, with ten dollars costs and disbursements.

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A large amount of coal was delivered under this contract; but subsequently and before the expiration of the time therein specified, the price of coal having risen, the plaintiffs refused to deliver any more coal under it. In this action, brought by them to recover the value of the coal delivered, held, that the contract was not an indivisible one, and full performance was not a condition precedent to a recovery by plaintiff; that, as no time of payment was specified in the contract, they were entitled to demand the pay for each lot of	

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2. — *Enticing wife from husband — right of, for — Good faith of person receiving — when a defense.*] Upon the trial of an action brought by a husband against his wife's father to recover damages for enticing away his wife, evidence was given tending to show that the wife, by reason of illness, was unable to leave her husband's house without assistance, and that her father, at her request, removed her to his own. The justice charged that, even if the husband's treatment of his wife was not improper, in fact, yet if such complaints were made to the defendant, by the wife and others, as induced him to believe that she was cruelly treated by her husband, and he acted in good faith in taking her to his house, the plaintiff could not recover.

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3. — *Obstruction in highway.*] The commissioners of highways of a town have no power to bring an action to enjoin the construction of a permanent obstruction in a highway. COYKENDALL v. DURKEE ..... 260

4. — *Right of, to recover money paid under a canceled contract.*] The plaintiff and defendant entered into an agreement, by which the plaintiff agreed to purchase certain land from the defendant for a price therein named; the plaintiff paid a portion of such price to the defendant. Afterwards, the plaintiff being in default, an agreement, of which the following is a copy, was indorsed on each copy contract, and signed and sealed by the respective parties: "I hereby surrender all my right, title and interest under and by virtue of the within agreement to ——— for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, and agree that the same shall be canceled and be of no effect from this date."

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*Held*, that the court erred in dismissing the complaint; that, upon the facts alleged therein, the plaintiff was entitled to maintain an action in equity to have the bond and mortgage canceled and delivered up to him.

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2. — *Chap. 482 of 1862—constitutionality of.*] Chapter 482 of 1862, providing for the collection of demands against ships and vessels is, so far as it relates to vessels wholly engaged in the internal commerce of this State, constitutional and valid. *Id.*

3. — *Canal boat—when a “vessel.”*] A canal boat is a “vessel” within the meaning of the said law. *Id.*

4. — *Who may create a lien.*] The owner of a canal boat made a contract with Pierce & Son, by which the latter were to make certain repairs in and upon the boat. The repairs were made and the price to be paid therefor was paid by the owner to Pierce & Son. The plaintiff, who had been employed by Pierce & Son, to work upon the boat, not having been paid for the services rendered by him, sought to enforce his claim against the boat under the said statute.

*Held*, that he had no right so to do, as his employment by Pierce & Son gave him no right under the law of 1862 to claim a lien. *Id.*

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**ALIEN**—*Devise to—partition, action for.*] 1. An action for partition may be brought, under the act of 1853, relating to disputed wills, when the property sought to be partitioned was devised, in the will of the testator, to a devisee who was incompetent to take by devise because of alienage.

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2. — *Filing of deposition, under chapter 115 of 1845—effect of naturalization.*] A testator devised certain real estate to his sister and her husband, for their joint lives and the life of the survivor, with remainder to the children of the sister. All these children were aliens at the time of the testator's death, and had not filed the deposition required by the laws of this State, to enable them to hold such real estate, but one of them filed the deposition as required by the act of 1845 (chap. 115), and all were naturalized prior to the death of their mother.

*Held*, that upon the death of the testator, this sister and her husband took an estate for life in the property.

That the devisees of the estate in remainder, being incompetent to take, such estate vested in the citizen heirs of the testator, subject to be defeated by the filing by the devisees of the deposition provided for in section 1 of chapter 115 of 1845.

That, upon the filing of such deposition by the said devisees, the estate of the heirs would divest, and the same would vest in the devisees named in the will.

Section 11 of the said act excepts from its operation only those interests which had become vested prior to its passage. *Id.*

3. — *Chapter 38 of 1875.*] That the omission of two of the devisees to file the deposition was cured by chapter 38 of the Laws of 1875, conferring upon heirs and devisees, being of the blood of the devisor, whether citizens or aliens, capacity to take and hold the real estate owned and held by the devisor at the time of his decease—except as against the State only; the act of 1875 being retroactive in its operation. *Id.*

#### **ALIMONY:**

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**AMENDMENTS**—*To pleadings—allowance of, by a referee—when proper—when allowed—surprise—proof of, required—Rights of defendant if plaintiff's pleading be amended—Rule 28—Terms of amendment.*

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in lieu of dower. The annuity was payable October ninth and April ninth in each year. The wife died April 1, 1877.

In an action by her executor to recover the *pro rata* proportion of the annuity up to that date, *held*, that the annuity could not be apportioned.

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2. — *Chap. 542 of 1875 — application of.*] Chapter 542 of 1875, changing the common-law rule as to the apportionment of annuities, only applies to instruments executed or taking effect after its passage. *Id.*

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2. — *From order — only one appeal therefrom, or from parts thereof allowed.]* By an order of the Special Term, made upon an application for the confirmation of the report of a referee, two claims presented by one M. to the referee, and allowed by him, were disallowed. M. appealed from so much of the order as disallowed one of the said claims. Subsequently and after the decision of the said appeal, he brought this appeal from the portion of the order disallowing the second claim.

*Held*, that his right to appeal from the order was exhausted by the first appeal; and that the second appeal could not be maintained.

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3. — *Additional affidavits — cannot be read upon appeal.]* Affidavits, made after the making of an order at the Special Term, cannot be read upon the hearing at the General Term, even although all the parties to the appeal consent thereto. *Id.*

4. — *To County Court — return by justice — truthfulness of, cannot be questioned.]* Upon an appeal to the County Court from a judgment of a justice of the peace, the truthfulness of the justice's return, if it be fully responsive to the notice of appeal, cannot be questioned nor controverted by affidavits, nor can a further return, as to the truth of matters in respect to which the original return is controverted by affidavits, be required.

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5. — *Remedy.]* If the return be false, the remedy of the party aggrieved thereby is by an action against the justice. *Id.*

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— *Demurrer to a portion of a pleading — full costs allowed upon appeal to the General Term.*

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**APPEARANCE :**

*See* VOLUNTARY APPEARANCE.

**APPLICATION** — *For insurance to company — what constitutes.*] To the question in the application, "Has any application been made to this or any other company for assurance on the life of the party; if so, with what result?" D. answered, "Yes, and always successful." It appeared that, in 1862 or 1863, he handed to the agent of a foreign insurance company an application for insurance; that the agent said he did not think the company would take him; that, upon D.'s request, he handed the application to the examiner for the company, who was then D.'s physician; that the agent subsequently told D. that the examiner said he could not pass him, and that the examination was a farce and an unnecessary expense to put the company to; and there the matter dropped. The court left it for the jury to say whether or not D.'s answer was a truthful one. *Held*, that it did not appear that an application was made to the company; that the application was not even made to the agent to be forwarded to the company; that the application was never completed. *EDINGTON v. ÆTNA LIFE INS. CO.* ..... 543

**APPORTIONMENT** — *Of annuity.*] 1. A testator who died April 9, 1858, left to his wife, by will, his mansion-house and certain land, together with cattle, farming implements, furniture, etc., and an annuity for life of \$10,000 a year, to be paid in semi-annual payments, the first half yearly payment to be made in six months from his decease, such devises and bequests being given in lieu of dower. The annuity was payable October ninth and April ninth in each year. The wife died on April 1, 1877.

In an action by her executor to recover the *pro rata* proportion of the annuity up to that date, *held*, that the annuity could not be apportioned.

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2. — *Chap. 542 of 1875 — application of.*] Chapter 542 of 1875, changing the common-law rule as to the apportionment of annuities, only applies to instruments executed or taking effect after its passage. *Id.*

**ARBITRATION** — *Policy of insurance — agreement to refer question of amount of loss to arbitration — when not enforceable.*] 1. The defendant issued to the plaintiff a policy of insurance upon certain personal property, by which it agreed to make good unto the assured all such immediate loss or damage as should happen by fire to the property specified, *the amount of loss to be estimated according to the actual cash value of the property* at the time of the loss.

In the ninth condition of the policy it was provided that in case differences should arise touching any loss or damage, after proof had been received in due form, the matter should, *at the written request of either party*, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy.

In the tenth condition of the policy it was provided that no suit or action against the company, for the recovery of any claim by virtue of the policy, should be sustainable in any court of law or chancery, *until after an award shall have been obtained, fixing the amount of such claim in the manner above provided.*

In this action, brought to recover the amount due thereunder, upon the destruction of the property, the defendant claimed that a difference had arisen as to the value of the property destroyed, and that as no award had been made by arbitrators, no recovery could be had under the policy. Neither party had requested, either in writing or otherwise, that the matter should be submitted to arbitrators.

*Held*, that by the terms of the ninth condition, no obligation to submit the amount of the loss to arbitrators arose, until a *written request* so to do had been made by one of the parties. *GIBBS v. CONTINENTAL INS. CO.* ..... 611

2. — *When agreement as to, only collateral to main agreement.*] *Somble*, that the condition as to submitting the amount of the loss or damage to arbitrators was only collateral to the main agreement of the defendant, which was to pay the amount of the loss, "to be estimated according to the actual cash value of the property at the time of the loss," and that such collateral agreement did not deprive the plaintiff of the right to maintain an action on the policy until such reference and an award, in pursuance thereof, had been had. *Id.*



**ARREST**—*Order of—motion to vacate—denied with leave to renew—renewal of motion after judgment.*] 1. November 20, 1869, an order for the arrest of the defendant was granted in this action, and on December 28, 1869, a motion to vacate the same was denied with leave to renew the motion on showing the amount secured by an attachment previously issued in the action. In 1872 the action was tried and judgment recovered by the plaintiff. In February, 1877, this motion was made to vacate the order of arrest.

*Held*, that it was properly denied as the leave to renew was only given for a special purpose, and the right to renew was terminated by the entry of the judgment. **MILLS v. RODEWALD**..... 439

2. — *Policemen—power of, to arrest for violating city ordinance.*] A policeman has no authority to arrest, without a warrant, a person violating a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordinance is accompanied by a breach of the peace.

**HENNESSY v. CONNOLLY**..... 173

— *Order of—neglect of party procuring, to enter judgment when it is in his power so to do—Code, § 288—discharge by order under—vacating said order—effect of.*

*See SCHELLY v. ZINK*..... 538

— *Order of—for conversion of property.*

*See WOODBRIDGE v. NELSON*..... 390

— *Order of—Rule 6 of 1874 requiring indorsement on—what a sufficient compliance with.*

*See KOPELOWICH v. KERSBURG*..... 178

**ASSAULT**—*Assault with intent to commit a rape—3 Rev. Stat. (8th ed.), 938, § 49.]* 1. In an indictment under the statute providing that every person who shall be convicted of an assault with the intent to commit robbery, burglary, rape, manslaughter, etc., shall be punished as therein provided, it is sufficient to allege that an assault was made upon a female child, "with intent then and there, willfully and feloniously, to commit a rape against the form of the statute," etc., and it is not necessary to allege that the intent was to "carnally and unlawfully know" the said child. **SINGER v. PEOPLE**..... 418

2. — *Consent of child under ten years of age.]* Where an assault with intent to commit rape is made upon a female child under the age of ten years, the fact that she assented thereto does not alter the nature of the crime or diminish the guilt of the accused. *Id.*

**ASSESSMENTS**—*Vacating of, in city of Brooklyn.]* 1. Since the passage of section 13 of chapter 633 of 1875 the statutory remedy, by petition, against void or avoidable assessments for local improvements in the city of Brooklyn, is confined to that portion of any such void or voidable assessment which is in excess of the fair value of the work actually done and the materials actually furnished, and which is, consequently, the result of fraud or extravagance. **MATTER OF MEAD**..... 349

2. — *Burden of proof.]* As it is only that portion of the assessment which is in excess of the fair value of the actual local improvement which is subject to review by petition, it rests upon the petitioner to allege and prove the existence and amount of such excess. *Id.*

3. — *Title to statutes.]* As the right to review an assessment by petition was created by an amendment to the city charter, which amendatory act had a charter title, such right could be constitutionally abridged or taken away by another amendment to the charter, having also a charter title. Any other construction would make the grant of the remedy by petition unconstitutional. *Id.*

4. — *Vacating of, in Brooklyn—chap. 663 of 1875—chap. 169 of 1861.]* Since the passage of section 13 of chapter 663 of 1875, in relation to vacating assessments in the city of Brooklyn, the provisions of section 5 of chapter 169 of 1861, directing that "no assessments on any piece or parcel of land shall exceed in amount one-half of the value thereof," is no longer in force, so as to justify the reduction of an assessment in accordance therewith.

**MATTER OF ADAMS**..... 355

**ASSESSMENTS — Continued.**

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5. — *Commissioners of — affidavit may be ordered heard after report made.*] The commissioners of estimate and assessment, acting under chapter 483 of 1862, had, after hearing the parties interested, prepared their report, and a motion to confirm the same had been duly noticed. At this stage of the proceedings, upon the application of certain of the parties interested, the court granted an order directing that certain affidavits should be submitted to, and considered by, the commissioners, or that the same should be used upon the motion to confirm the report of such commissioners, as the corporation counsel should prefer.

*Held*, that the order was proper and should be affirmed.

MATTER OF DEPARTMENT OF PUBLIC WORKS ..... 483

**ASSETS :**

*See* MUNICIPAL CORPORATIONS.

MARSHALLING OF ASSETS.

EXECUTORS, 2.

**ASSIGNEE — Meaning of, within § 399 of Code — what witnesses excluded by.]**

1. An action was brought upon a promissory note made by the defendant Warner, to the order of and indorsed by one Ayer, and subsequently indorsed by one Alexander, and by him transferred to the plaintiff. Alexander died before the trial. The signatures of the maker and indorsers were proved. Ayer was called by the defendants, the legal representatives of Warner, and against plaintiff's objection and exception allowed to testify as to a personal transaction, between himself and Alexander, tending to establish the defense of usury.

*Held*, that Richardson was an "assignee" of Alexander, within the meaning of section 399 of the Code:

That Ayer was a person "from, through or under whom" Richardson derived title within the meaning of that section.

That the fact that the defendants, the legal representatives of Warner, by whom Ayer was called, did not derive title from him, did not render him competent.

That the evidence should have been excluded. *RICHARDSON v. WARNER..* 13

2. — *Code of Civil Procedure, § 829.*] Under section 829 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, the witness would have been competent, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. *Id.*

**ASSIGNMENT — Of fund — distinction between it and a bill of exchange —**

*what is.*] 1. This action was brought upon the following instrument: "Rochester, July 17, 1875. Edward L. Hopkins. One month after date, pay to the order of Hollister & Co., seven hundred and eighty-two dollars and thirty-four cents, and charge the same to me, to apply on contract for your building on South avenue. (Signed) J. R. Flowerday." The plaintiff proved the acceptance and indorsement of the instrument and rested. Defendant offered to prove that there was nothing due to the drawer of the instrument upon his building contract, at the time it was drawn, and that there was no consideration for the acceptance between the drawer and acceptor, which evidence was, upon plaintiff's objection, excluded.

*Held*, that the instrument was a bill of exchange, and not a mere assignment of a fund, and that the evidence offered was properly rejected as immaterial and irrelevant. *HOLLISTER v. HOPKINS.* ..... 210

2. — *General — failure of assignee to give bond — effect of — chap. 348 of 1860 and chap. 56 of 1875.*] Under the provisions of chapter 348 of 1860, as amended by chapter 56 of 1875, relating to general assignments, the failure of the assignee to enter into the bond within the time thereby prescribed does not invalidate the assignment. The statute simply prohibits him from selling the assigned property or converting it to the purposes of the trust until he shall have entered into such bond. *WORTHY v. BENHAM.* ..... 176

— *Of mortgage — latent defects in acknowledgment — effect of — Recording acts — Discharge by mortgagee, after assignment of.*

*See* HEILBRUN v. HAMMOND. .... 474

**ASSIGNMENT** — *Continued.*

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— *Of policy of insurance upon life of husband for benefit of wife, not assignable by her.*

*See* WILSON v. LAWRENCE ..... 288

**ATTACHMENT** — *For contempt — when it should not be allowed.*] Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue.

COCHRAN v. INGERSOLL ..... 368

**ATTENDING PHYSICIAN:**

*See* PHYSICIAN.

**ATTORNEY AND CLIENT** — *Services rendered by an attorney — effect on recovery for, of death of attorney during pendency of action.*] 1. The defendant's intestate and the plaintiffs' testator entered into an agreement whereby the former, an attorney, agreed to collect the rents due on certain manorial leases belonging to the latter, and to receive for such services the taxable costs of the actions to be brought; under which agreement some twenty or thirty actions were commenced. At the time of the death of defendant's intestate, plaintiffs had been defeated in one action because of a failure to notify the tenant of an assignment of the lease, two actions had been discontinued and the costs paid, and seven were pending; to the two actions discontinued and the seven actions still pending, the same defense of neglect to give notice of the assignment of the lease had been interposed. Upon an accounting, the referee found that the amount of the taxable costs in said nine actions was \$901.81, but refused to allow that amount to the defendant. The court at Special Term held that as the notice was not properly a proceeding in the action, that the mere fact that the defendant's intestate commenced the actions for the assignee of the lease, without ascertaining that the tenant had been notified of the assignment, was not sufficient to show that he was guilty of negligence or wanting in reasonable professional skill, and allowed to the defendant the \$901.81.

*Held*, that the defendant should be allowed that amount.

SEYMOUR v. CAGGER ..... 29

2. — *Negligence of attorney — burden of proof as to.*] Where a client refuses to pay an attorney's bill on the ground that he had been defeated and damaged by reason of the negligence and want of skill of the attorney, such negligence or want of skill must be established by him affirmatively.

A failure to succeed in a law suit is not *prima facie* evidence of negligence or want of proper skill. *Id.*

— *Attorney may take security for future costs.*

*See* HALL v. CROUSE ..... 557

**BANK:**

*See* SAVINGS BANK.

**BANKRUPT ACT** — *Compromise under — contingent liabilities not discharged by.*] 1. The defendants were indorsers of a promissory note held by the plaintiffs. After the giving of the note, but before its maturity, the defendants instituted proceedings under the bankrupt act to procure a discharge from their debts by a compromise proposed to, and accepted by the creditors. They set forth in the statement of their debts this note, and tendered to the plaintiffs the twenty-five per cent accepted by the other creditors, but the same was rejected. After defendants' discharge this action was brought upon the note.

*Held*, that their liability thereon was not affected by the proceedings in bankruptcy; that the compromise only released them from those debts or liabilities which had then become fixed and due, and not from debts on which they were only contingently liable. SMITH v. KRAUSKOPF ..... 526

**BANKRUPT ACT—Continued.**

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2. — *When proceedings are determined.*] Under the provisions of the bankrupt act prohibiting any creditor who has proved his debt or claim from maintaining any suit at law or in equity thereupon against the bankrupt, unless a "discharge has been refused or the proceedings have been determined without a discharge," the proceedings are not determined unless an order to that effect has been entered by the United States Court.

MILLER v. O'KAIN. . . . . 594

3. — *Surety paying claim against bankrupt—position of.*] If a creditor has proved his claim against the bankrupt, a surety for the bankrupt, who, after such proof thereof, pays the debt, occupies the position of the original creditor as to the enforcement of the claim by suit. *Id.*

4. — *Assignee under—actions by—jurisdiction of State courts over.*] This action was brought upon an undertaking given to procure the discharge from arrest of one Miller, who had been sued by the plaintiff, as an assignee in bankruptcy, to recover money collected by Miller for the bankrupt, which he had failed to pay over. Plaintiff having recovered a judgment in the first action for \$2,195.50 and taken the necessary measures to charge the bail, brought this action upon the undertaking.

*Held,* That the action was properly brought in the State court and could be maintained. TULLIS v. MILLER. . . . . 363

5. — *Legal assets or debts.*] That even if the amendment to the bankrupt act, passed in 1874, operated in any case to deprive the State courts of jurisdiction over an action brought by an assignee in bankruptcy, this case was not affected thereby, for the reason that the cause of action did not arise under the laws of the United States, and that it was not brought for the collection of the legal assets or debts of the bankrupt. *Id.*

**BILL OF EXCHANGE—What is.**] This action was brought upon the following instrument: "Rochester, July 17, 1875. Edward L. Hopkins. One month after date, pay to the order of Hollister & Co., seven hundred and eighty-two dollars and thirty-four cents, and charge the same to me, to apply on contract for your building on South avenue. (Signed) J. R. Flowerday." The plaintiff proved the acceptance and indorsement of the instrument and rested. Defendant offered to prove that there was nothing due to the drawer of the instrument upon his building contract, at the time it was drawn, and that there was no consideration for the acceptance between the drawer and acceptor, which evidence was, upon plaintiff's objection, excluded.

*Held,* that the instrument was a bill of exchange, and not a mere assignment of a fund, and that the evidence offered was properly rejected as immaterial and irrelevant. HOLLISTER v. HOPKINS. . . . . 210

**BILL OF PARTICULARS—When ordered in action for conversion.**] The complaint in this action alleged that in or about the years 1876 and 1877, this plaintiff was the lawful owner of, and entitled to, the quiet and peaceable possession of certain goods, chattels and personal property, of the value of \$5,000, and that the same were wrongfully taken and carried away by the defendant herein and converted to his own use.

*Held,* that the action was a proper one in which to order a bill of particulars. ROBINSON v. COMER. . . . . 291

**BOND—Form of, on application for a portion of a legacy for the support of the legatees—2 R. S., 98, §§ 82, 83—what must be shown to authorize the order.**]

1. The respondent, a legatee for life in the rents etc., of certain property devised by the will of appellant's testator, applied to the surrogate to be allowed to receive such part of the legacy as was necessary for her support, under the statute authorizing the surrogate to allow this to be done, upon it appearing to him that the assets in the hands of the executor exceed, by one-third, all debts, etc., then known, upon the execution of a satisfactory bond for the return of such portion, with interest, whenever required. A bond was tendered by the petitioners conditioned for the refunding of such moneys "as may be necessary to enable the executors to pay and discharge the debts of the testator, and the legacy having priority to hers."

**BOND — Continued.**

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Upon appeal from an order made by the surrogate directing the payment to the petitioner of a portion of her legacy, *held*, that, in order to give jurisdiction to the surrogate, it must appear that there is a surplus of assets by at least one-third; and that as, in this case, no proof on this point appeared to have been taken before the surrogate, the order was unauthorized.

That the bond did not conform to the statute, which required it to be conditioned for the refunding of the money *whenever required*, and not simply, if necessary for the payment of debts and prior legacies.

BARNES v. BARNES. . . . . 233

2. — *Effect of a failure by an assignee under a general assignment to give bond within the time prescribed.*] Under the provisions of chapter 348 of Laws of 1860 as amended by chapter 56 of the Laws of 1875, the failure of an assignee to give a bond does not invalidate the assignment, but the statute simply prohibits him from selling the assigned property or converting it to the purposes of the trust until he shall have entered into such bond.

WORTHY v. BENHAM. . . . . 176

**BONDING** — *Of towns, in aid of railroad company — annulling of proceedings — effect of, on powers of commissioners.*

See BIDDLECOM v. NEWTON. . . . . 582

**BOOK :**

See MEMORANDA.

**BOUNDARY LINE** — *when it can be established by parol.*] Where a boundary line is uncertain, indefinite and disputed, the owners of the adjoining lots may agree upon and establish, by parol, a line, which neither can afterwards dispute. AMBLER v. COX. . . . . 295

**BRIDGES** — *Duties of commissioners of highways as to — negligence.*

See HICKS v. CHAFFEE. . . . . 294

**BROOKLYN** — *Vacating assessments in — chap. 663 of 1875 — chap. 169 of 1861.*] 1. Since the passage of section 13 of chapter 663 of 1875, in relation to vacating assessments in the city of Brooklyn, the provisions of section 5 of chapter 169 of 1861, directing that "no assessments on any piece or parcel of land shall exceed in amount one-half of the value thereof," is no longer in force, so as to justify the reduction of an assessment in accordance therewith. MATTER OF ADAMS. . . . . 355

2. — *City of — vacating assessments in.*] Since the passage of section 13 of chapter 663 of 1875 the statutory remedy by petition, against void or avoidable assessments for local improvements in the city of Brooklyn, is confined to that portion of any such void or voidable assessment which is in excess of the fair value of the work actually done and the materials actually furnished, and which is, consequently, the result of fraud or extravagance. MATTER OF MEAD. . . . . 349

3. — *Burden of proof.*] As it is only that portion of the assessment which is in excess of the fair value of the actual local improvement which is subject to review by petition, it rests upon the petitioner to allege and prove the existence and amount of such excess. *Id.*

4. — *Title to statutes.*] As the right to review an assessment by petition was created by an amendment to the city charter, which amendatory act had a charter title, such right could be constitutionally abridged or taken away by another amendment to the charter, having also a charter title. Any other construction would make the grant of the remedy by petition unconstitutional. *Id.*

5. — *Justice of the peace in — jurisdiction of.*] By section 35 of chapter 125 of 1849, conferring the same jurisdiction upon justices of the peace in the city of Brooklyn, *in said city*, as justices of towns have by law *in respect to the towns*, the legislature intended to restrict the territorial jurisdiction of the justices to the city itself. GERATY v. REID. . . . . 813

- BUFFALO** — *Acquisition of fee of land by city, for sea-wall — uses to which the city may apply it — railroad.*  
*See SWEET v. BUFFALO, N. Y AND PHIL. RY. Co.* ..... 648
- BURDEN OF PROOF** — *Negligence of an attorney.*] Where a client refuses to pay an attorney's bill on the ground that he had been defeated and damaged by reason of the negligence and want of skill of the attorney, such negligence or want of skill must be established by him affirmatively. A failure to succeed in a law suit is not *prima facie* evidence of negligence or want of proper skill. *SEYMOUR v. CAGGER*..... 29
- BUSINESS** — *Separate, of wife — what is.*  
*See SMITH v. KENNEDY*..... 9
- CANAL APPRAISERS** — *Refusal to make return to canal board — mandamus.*] Upon an appeal by a claimant to the canal board from a decision of the Canal Appraisers, the latter refused to make a return to the appellate tribunal, on the grounds, first, that the appeal was not taken in time; and, second, that the relator had settled his claim and given a release in full therefor.  
*Held*, that both of these questions were to be considered and decided by the appellate tribunal and not by the Canal Appraisers, and that a *mandamus* should issue compelling the Appraisers to make the required return.  
*PEOPLE EX REL. FREER v. CANAL APPRAISERS* ..... 64
- CANAL BOAT** — *When a "vessel" within the meaning of chap. 482 of 1862.*  
*See FRALICK v. BETTS*..... 632
- CANAL LANDS** — *What lands taken for canals may be abandoned — Const. of 1846, art. 7, § 6.*] 1. Section 3 of chapter 352 of 1849, authorizing the commissioners of the land office to convey "lands taken for canal purposes," which the canal board shall have determined may be sold beneficially to the State, and chapter 267 of 1857, authorizing them to convey any "lands taken for the purposes of the canals of this State" when the canal board shall have determined that they have been abandoned, authorize a conveyance of lands taken for the bed of the canal itself, when that portion of the canal has fallen into decay, and ceased practically to be used as a canal.  
*PEOPLE v. STEPHENS*..... 17
2. *Power of legislature to dispose of canals.*] Section 6 of article 7 of the Constitution of 1846, providing that "the legislature shall not sell, lease or otherwise dispose of any of the canals of this State, but they shall remain the property of the State and under its management forever," only applies to the canals while they continue to be canals, and not to cases in which, as the result of natural causes, not fraudulently produced, the canals cease to be used as canals and are of no further use to the people of the State. *Id.*
3. *Construction of statutes.*] In determining the extent of the authority conferred upon a board of State officers, resort may be had to the subsequent legislative construction of the statutes conferring the same. *Id.*
4. *Letters patent — presumption as to.*] Letters patent are presumed to have been regularly issued. *Id.*
- CASE** — *Questions arising upon a trial — can only be reviewed upon a case settled.*  
*See McLEAN v. COLE*..... 300
- CATTLE GUARDS:**  
*See NEGLIGENCE.*
- CERTIFICATE** — *Of payment of stock — required to be filed by section 11 of chapter 40 of 1848 must be sworn to, a mere acknowledgment not a sufficient compliance with the provisions of the statute.*  
*See BROWN v. SMITH*..... 408
- *Of acknowledgment — latent defects in — effect of, on the record of the instrument acknowledged.*  
*See HEILBRUN v. HAMMOND*..... 474

**CERTIORARI** — *Review of special proceeding on—costs upon—chapter 270 of 1854, section 3.*

*See* PEOPLE EX REL. GREEN v. SMITH..... 227

**CHALLENGES** — *Review of decision as to—evidence upon—impression as to guilt—when it does not render a juror incompetent.*

*See* GREENFIELD v. PEOPLE..... 242

**CHARTER** — *Discount of note given by an officer of a corporation—in violation of its charter—what is.*] This action was brought by the plaintiff, as trustee in bankruptcy of the Citizens' Savings Bank, upon two drafts drawn by a firm in New York upon a firm in Charleston, accepted by the latter firm and delivered to one Palmer who was a member of both firms. Upon his application the drafts were subsequently discounted by the bank, of which he was the vice-president, and of the stock of which he owned more than four shares. The drafts were drawn and accepted for the accommodation of Palmer.

The charter of the bank provided that no director or officer of said corporation should borrow or use any portion of the funds thereof, and that no loan of money should be made by it to any stockholder owning more than four shares of stock therein. It was insisted by the defendant that the drafts were void because taken by the bank in violation of the provisions of its charter. *Held*, that the prohibitions of the charter did not apply to a case in which a loan was made to a firm, corporation or association in which an officer or stockholder of the bank was a partner, stockholder or member, and that the plaintiff was entitled to recover. FISHER v. MURDOCK..... 485

**CHATTEL MORTGAGE** — *Sale of property under—no implied warranty of title arises.*] Upon a sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling not his own title to the property, but that which he has acquired through the mortgage, and no warranty of title of the property so sold is to be implied against the mortgagee. SHEPPARD v. EARLES..... 651

**CITIES :**

*See* MUNICIPAL CORPORATION.

**CITY ORDINANCE** — *Policeman—power of, to arrest for violation of.*] A policeman has no authority to arrest, without a warrant, a person violating a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordinance is accompanied by a breach of the peace. HENNESSY v. CONNOLLY..... 178

**CLOUD ON TITLE** — *Action in equity to remove—when not maintainable—remedy by ejectment.*] The plaintiff herein claimed that one George Webster, the owner of a house and lot described in the complaint herein, on September 26, 1846, made a general assignment of all his property, including the house and lot in question, to one Russell, who, on May 6, 1847, conveyed the same to Simeon D. Webster; that thereafter, and on July 6, 1859, the said George and Eleanor, his wife, conveyed the said premises to the said Simeon D.; that the plaintiff had succeeded to the rights of the said Simeon D.; that on April 18, 1861, a receiver, appointed in supplementary proceedings instituted by a judgment creditor of George Webster, sold the said land to one Humphrey, through whom the defendants, who are in possession thereof, claim title.

This action was brought to have the receiver's deed set aside as irregular, and canceled, and for an accounting as to the rents and profits received by the defendants. *Held*, that the facts of the case would not sustain an action in equity, such as the present one, to set aside the deed as a cloud upon plaintiff's title; but that the plaintiff's remedy, if any, was by ejectment.

BOCKES v. LANSING..... 88

**CODE** — *Section 288—order of arrest—neglect of party procuring, to enter judgment when it is in his power so to do—discharge by order under—vacating said order—effect of.*

*See* SCHELLY v. ZINK..... 538

## CODE—Continued.

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— § 292 — *Supplementary proceedings.*] In order to authorize the making of an order before execution returned requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply his property to the satisfaction of the judgment, and has been refused by him.

FIRST NATIONAL BANK *v.* WILSON ..... 282

— § 339 — *Appeal by executor — security on — failure to apply for limitation of amount of, under Code, § 339 — presumption of assets arising from.*

See YATES *v.* BURCH ..... 622

— § 348 — *Meaning of "adverse party" as used in.*

See YATES *v.* BURCH ..... 622

— § 399 — *Who precluded by — change made by Code of Civil Procedure.*] Where A the payee of a note, indorsed it to B and B indorsed and delivered it to C B having died before action brought by C *held*, that C was an assignee of B within the meaning of this section, and A was a person "from, through, or under whom" C derived title within the meaning of this section, and A, therefore not a competent witness to establish the defense of usury on the discount of the note by B but that he would have been a competent witness under section 829 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest.

RICHARDSON *v.* WARNER ..... 18

CODE OF CIVIL PROCEDURE — § 511 — *Severance of causes of action under — offer to allow judgment to be taken for one of several claims — effect of, on right to sever.*

See BRADBURY *v.* WINTERBOTTOM ..... 586

— § 772 — *Provisional remedy — what is not, under.*] An order authorizing a substituted or constructive service of a summons is not an order granting a provisional remedy, within the meaning of section 772 of the Code of Civil Procedure. MCCARTHY *v.* MCCARTHY ..... 579

— § 829 — *Who competent as witness under — although precluded from testifying by Code of Procedure.*] Where A the payee of a note, indorsed it to B who discounted it at a usurious rate, and subsequently indorsed and delivered it to C and B died before action brought by C *held*, that while A, under section 399 of the old Code, was not a competent witness to prove the usury, as being a person "from, through, or under whom" C derived title within the meaning of that section, yet he was competent under section 829 of the Code of Civil Procedure, as thereby the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. RICHARDSON *v.* WARNER ..... 18

— § 1847 — *Appeal from order overruling or sustaining a demurrer to the whole or a portion of a pleading — full costs allowed on.*

See VAN GELDER *v.* VAN GELDER ..... 118

— § 1349 — *Appeal from an order overruling or sustaining a demurrer to the whole or a portion of a pleading — full costs are allowed.*

See VAN GELDER *v.* VAN GELDER ..... 118

COHOES — *Liability of, for accidents contributed to by obstructions in highway — for damages sustained by accident.*

See RING *v.* CITY OF COHOES ..... 77

COLLECTOR'S BOND — *Sureties upon — rights of.*] A bank collected the rents of certain real estate in Watertown as the agent of the owners, George F. Paddock, Oscar Paddock and Edwin L. Paddock, from December 8, 1874, to October 29, 1875. On the former date Blood, Sawyer and George F. Paddock signed as sureties the bond of one Rogers, as collector of the town of Watertown, which bond was duly filed. Rogers failed to pay over the sum of \$11,848.68 of the taxes collected by him, but deposited it with a firm of bankers, of which George F. Paddock was a member, which firm converted



**COLLECTOR'S BOND** — *Continued.*

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the money to its own use and then became bankrupt. On October 29, 1875, Paddock's interest in the real estate was sold under a judgment recovered in an action brought by the supervisors upon the bond, the proceeds thereof being insufficient to pay the amount of the judgment for which the other sureties were liable. This judgment directed that the real property of Paddock should be first sold thereunder, before resorting to the property of his co-obligors.

In an action by the assignees in bankruptcy of the firm to recover from the bank the bankrupts' interest in the rents collected by it, the other sureties claimed that as between them and Paddock, the latter was primarily liable for the moneys converted by his firm, and that they could avail themselves, in equity, of the lien of the bond on his real estate; and that he being insolvent, and his real estate being inadequate security, they could reach the rents by means of a receiver, in the same manner that a mortgagee could under like circumstances. *Held*, that this claim could not be sustained and that the assignee was entitled to the money.

*Seem*, that the lien created by the filing of a collector's bond is analogous to that of a judgment creditor, and not to that of a mortgagee; and the owner of the property has a right to redeem and a right to the possession, and to receive the rents and profits after a sale thereunder, the same as after a sale under an ordinary judgment. *UPHAM v. PADDOCK*..... 571

**COMMISSIONS** — *On sales, contract for — construction of.*

*See* *RUSSELL v. CONSOLIDATED FRUIT JAR CO.*..... 286

**COMMISSIONER OF DEEDS:**

*See* *NOTARY PUBLIC.*

**COMMISSIONERS OF HIGHWAYS** — *Power of, to enjoin purpresture.]*

The commissioners of highways of a town have no power to bring an action to enjoin the construction of a permanent obstruction in the highway.

*COYKENDALL v. DURKEE*..... 260

— *Of highways — duties of, as to bridges — negligence.*

*See* *HICKS v. CHAFFEE*..... 294

**COMMISSIONERS OF LAND OFFICE** — *Authority of, to convey canal lands under chap. 352 of 1849, § 3, and chap. 267 of 1857 — not in conflict with Constitution of 1848, article 7, § 6.*

*See* *PEOPLE v. STEPHENS*..... 17

**COMMISSIONER OF SCHOOLS:**

*See* *SCHOOL COMMISSIONER.*

**COMITY** — *Between States — enforcement in this State of statute of another State.*

*See* *STALLKNECHT v. PENNSYLVANIA R. R. CO.*..... 451

**COMMON CARRIER:**

*See* *RAILROAD.*

**COMPLAINT** — *Alleging obstruction of highway — public nuisance — when an action to abate is maintainable.*

*See* *VAN BRUNT v. AHEARN*..... 388

— *Striking out of, for refusal of party to produce paper on trial.*

*See* *PLEADING.*

**COMPROMISE** — *Under bankrupt act — contingent liabilities not discharged by.]*

The defendants were indorsers of a promissory note held by the plaintiffs. After the giving of the note, but before its maturity, the defendants instituted proceedings under the bankrupt act to procure a discharge from their debts by a compromise proposed to, and accepted by the creditors. They set forth in the statement of their debts this note, and tendered to the plaintiffs the twenty-five per cent accepted by the other creditors, but the same was rejected. After defendant's discharge, this action was brought upon the note.

**COMPROMISE** — *Continued.*

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*Held*, that their liability thereon was not affected by the proceedings in bankruptcy; that the compromise only released them from those debts or liabilities which had then become fixed and due, and not from debts on which they were only contingently liable. **SMITH v. KRAUSKOPF**..... 526

**CONDITIONS** — *in policy of insurance — power of agent to waive.*

*See* **WHITED v. GERMANIA FIRE INS. CO.**..... 191

**CONDITION PRECEDENT** — *Contract — when divisible — full performance, when not a condition precedent to recover, in action thereon.*

*See* **PER LEE v. BEEBE** ..... 89

**CONSENT** — *Of a child under ten years of age — does not affect the crime of assault with intent to commit rape,*

*See* **SINGER v. PEOPLE**..... 418

**CONSIDERATION** — *Failure of, on exchange of note for bond and mortgage.]*

1. Prior to September 29, 1871, Weir, as the testamentary guardian of the plaintiff, had received \$500 in cash and a bond and mortgage for \$1,100. On that day plaintiff and Weir stated to the defendant that Weir had used and spent the \$500; that he could not repay the same and could only secure it by a bond and mortgage on his house which was already incumbered; that Weir could not make a mortgage directly to his ward and asked defendant to take a bond and mortgage on Weir's house and give his note for the \$500. Defendant accordingly gave a promissory note for \$500, payable February 7, 1875, when plaintiff would be of age, "to Robert Weir, as guardian of James H. Burhans," with interest payable annually, and received from Weir a bond and mortgage for the same amount, payable at the same time. Subsequently Weir's house was sold upon the foreclosure of a prior mortgage and no surplus remained for payment of defendant's mortgage.

In an action upon the note, *held*, that upon the exchange of the note for the bond and mortgage each became a valid and legal obligation, enforceable by the holder as a purchaser for value, and that plaintiff was entitled to recover though defendant had received nothing upon his mortgage.

**BURHANS v. CARTER**..... 153

2. — *Of contract — what sufficient to support it.]* Plaintiff and defendant being the owners respectively of two pieces of property each adjoining another lot, and fearing that the latter would be so used as to injure their property, entered into an agreement by which the plaintiff agreed to buy the lot for \$2,500, and the defendant agreed to pay him \$100 for so doing. Plaintiff having purchased the lot, brought this action to recover the \$100.

*Held*, that there was a good consideration to support the contract, and that it could be enforced. **REYNOLDS v. GUILBERT**..... 801

— *Future advances — mortgage given to secure — is valid — effect thereon of subsequent liens — consideration of mortgage may be shown by parol.*

*See* **HALL v. CROUSE**..... 557

— *What must exist to sustain covenant to stand seized — when a contract is not enforceable by a stranger to the consideration thereof.*

*See* **LOSSEE v. ELLIS**..... 635

**CONSPIRACY** — *Statements of one conspirator — when admissible against his co-conspirator.]*

Upon the trial of an indictment against several persons for conspiracy to cheat and defraud, depositions of one conspirator, taken upon his examination before a justice of the peace after his arrest for the alleged conspiracy, and several months after the accused had ceased to act together in furtherance of the conspiracy, are inadmissible as evidence against a coconspirator. **STONE v. PEOPLE**..... 263

**CONSTITUTION** — 1876, art. 7, § 6 — *What lands taken for canals may be abandoned.]*

1. Section 3 of chapter 352 of 1849, authorizing the commissioners of the land office to convey "lands taken for canal purposes," which the canal board shall have determined may be sold beneficially to the State, and chapter 267 of 1857, authorizing them to convey any "lands taken for the purposes of the canals of this State" when the canal board shall have

**CONSTITUTION — Continued.**

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determined that they have been abandoned, authorize a conveyance of lands taken for the bed of the canal itself, when that portion of the canal has fallen into decay, and ceased practically to be used as a canal.

PEOPLE v. STEPHENS..... 17

2. — *Power of legislature to dispose of canals.*] Section 6 of article 7 of the Constitution of 1846, providing that "the legislature shall not sell, lease or otherwise dispose of any of the canals of this State, but they shall remain the property of the State and under its management forever," only applies to the canals while they continue to be canals, and not to cases in which, as the result of natural causes, not fraudulently produced, the canals cease to be used as canals and are of no further use to the people of the State. *Id.*

3. — *Construction of statutes.*] In determining the extent of the authority conferred upon a board of State officers, resort may be had to the subsequent legislative construction of the statutes conferring the same. *Id.*

4. — *Letters-patent — presumption as to.*] Letters-patent are presumed to have been regularly issued. *Id.*

**CONTEMPT — Refusal, of party to action, to produce paper — striking out complaint.**] 1. Upon the trial of this action, brought to foreclose a bond and mortgage, in which the defense was payment, the plaintiff having been subpoenaed to produce the bond was called as a witness and asked if he had it, to which he said he did not have it; that he did not have it in his possession when subpoenaed. The court then stated that the question was, whether he had control of it. After about an hour had been occupied by counsel in his efforts to find out where the bond was, the counsel for the plaintiff stated that he had it in his pocket, and being asked by the court if he would produce it said that he declined to do so at present, whereupon the justice ordered the complaint to be stricken out. *Held*, that this was proper.

SHELF v. MORRISON..... 110

2. — *Attachment for — when it should not be allowed.*] Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue. COCHRAN v. INGERSOLL..... 868

**CONTINGENT LIABILITY — Not discharged by compromise under bankrupt act.**

See SMITH v. KRAUSKOPF..... 526

**CONTRACT — Exchange of note for bond and mortgage — failure of consideration.**] 1. Prior to September 29, 1871, Weir, as the testamentary guardian of the plaintiff, had received \$500 in cash and a bond and mortgage for \$1,100. On that day plaintiff and Weir stated to the defendant that Weir had used and spent the \$500; that he could not repay the same, and could only secure it by a bond and mortgage on his house, which was already encumbered; that Weir could not make a mortgage directly to his ward and asked defendant to take a bond and mortgage on Weir's house and give his note for the \$500. Defendant accordingly gave a promissory note for \$500, payable February 7, 1875, when plaintiff would be of age, "to Robert Weir, as guardian of James H. Burhans," with interest payable annually, and received from Weir a bond and mortgage for the same amount, payable at the same time. Subsequently Weir's house was sold upon the foreclosure of a prior mortgage and no surplus remained for payment of defendant's mortgage.

In an action upon the note, *held*, that upon the exchange of the note for the bond and mortgage each became a valid and legal obligation, enforceable by the holder as a purchaser for value, and that plaintiff was entitled to recover though defendant had received nothing upon his mortgage.

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2. — *Agreement varying terms of note — when it cannot be established by parol.*] *Semble*, that an agreement that the defendant should not be liable on

**CONTRACT — Continued.**

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the note according to the terms thereof, but only for so much as he should receive upon the bond and mortgage, could not be established by parol. *Id.*

3. — *Mortgage — assignment of — direction to pay part of the amount thereby secured to the heirs and executors of the mortgagees — effect of assignment by mortgagees — payment to assignee.*] One Benham conveyed certain real estate to one Pennock, and took back a purchase-money mortgage for \$2,800, as to \$1,400 of which it was provided that, as Benham's wife had refused to join in the deed, it should be set apart as an indemnity against her claim of dower, the interest to be paid to Benham during his life, and in case he survived his wife, the principal to be paid to him or his heirs, executors or administrators; in case she survived him the interest to be paid to her during her life, if she elected to receive it instead of claiming her dower, and if not, then no interest to be paid until her death, but the principal to be paid within twelve months thereafter to the heirs, executors or administrators of Benham. Benham assigned the mortgage, and the same was paid and by the assignee satisfied of record. The wife survived the husband and elected to take the interest of \$1,400, instead of her dower. After her death the administrator of Benham brought this action, claiming that Benham had no right to assign the mortgage; that the \$1,400 therein reserved was made a trust fund for the benefit of Benham's heirs, and that the payment to the assignee did not satisfy the same.

*Held*, that the assignment by Benham was valid, and that the payment to the assignee satisfied and discharged the mortgage. *BENHAM v. PENNOCK..* 103

4. — *For sale of lands — note given upon signing contract — in an action upon the note plaintiff must prove performance of the contract.*] On November 15, 1875, the parties to this action entered into an agreement, whereby the plaintiff agreed to sell certain land to the defendant, and to deliver the deed on December fifteenth, the defendant to pay on that day a note for \$500, given when the contract was signed, and \$3,300 in cash, being the balance of the purchase-money.

In an action by the plaintiff upon the note, given at the time of the signing of the contract, *held*, that it rested upon her to prove a performance or tender of performance of the contract upon her part, and that, failing so to do, she was not entitled to recover. *HOAG v. PARR.....* 95

5. — *Tender.*] There being no place specified in the contract for the delivery of the deed and the payment of the money, and the defendant being a resident of this State, the plaintiff was bound to find the defendant and make a tender to him personally, or at least to show that after thorough efforts and inquiries he was unable to find him. *Id.*

6. — *Excuse for neglect to make.*] In order to excuse a personal tender, it must appear that the defendant was out of the State, beyond plaintiff's reach, or else that he intentionally avoided him or kept out of his way. *Id.*

7. — *When divisible — Full performance — when not a condition precedent to recovery.*] Plaintiffs and defendants entered into an agreement, whereby the plaintiffs agreed to sell and deliver to the defendants all the coal they should want for their use, for a year, or until the next spring, at five dollars and fifty cents per ton, deliveries to be made as long as defendants should wish them, the defendants agreeing to receive the same at that price.

A large amount of coal was delivered under this contract; but subsequently and before the expiration of the time therein specified, the price of coal having risen, the plaintiffs refused to deliver any more coal under it. In this action brought by them to recover the value of the coal delivered, *held*, that the contract was not an indivisible one, and full performance was not a condition precedent to a recovery by plaintiff; that, as no time of payment was specified in the contract, they were entitled to demand the pay for each lot of coal as delivered, and that they were therefore entitled to recover the price of the coal delivered, subject to the defendants' right to recoup any damages they might have sustained by reason of the breach of the contract.

*PER LEE v. BEEBE.....* 89

8. — *For sale of land — insurance on interest of purchaser of land — in possession and in default under a contract for the sale thereof.*] A policy of insurance issued to one in possession of land under a contract for the purchase thereof, is not rendered invalid by the fact that, at the time of issuing

**CONTRACT — Continued.**

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the policy, the assured has, by a failure to perform the contract on his part, rendered the same voidable at the election of the vendor, where such right has not been exercised, although the fact that he was in default was not stated to the company. *PELTON v. WESTCHESTER FIRE INS. CO.*..... 23

9. — *Services rendered by an attorney — effect on recovery for, of death of attorney during pendency of action.*] The defendant's intestate and the plaintiffs' testator entered into an agreement whereby the former, an attorney, agreed to collect the rents due on certain manorial leases belonging to the latter, and to receive for such services the taxable costs of the actions to be brought; under which agreement some twenty or thirty actions were commenced. At the time of the death of defendant's intestate, plaintiffs had been defeated in one action because of a failure to notify the tenant of an assignment of the lease, two actions had been discontinued and the costs paid, and seven were pending; to the two actions discontinued and the seven actions still pending, the same defense of neglect to give notice of the assignment of the lease had been interposed. Upon an accounting, the referee found that the amount of the taxable costs in said nine actions was \$901.81, but refused to allow that amount to the defendant. The court, at Special Term held, that as the notice was not properly a proceeding in the action, that the mere fact that the defendant's intestate commenced the actions for the assignee of the lease, without ascertaining that the tenant had been notified of the assignment, was not sufficient to show that he was guilty of negligence or wanting in reasonable professional skill, and allowed to the defendant the \$901.81. *Held*, that the defendant should be allowed that amount. *SEYMOUR v. CAGGER*..... 29

10. — *Negligence of attorney — burden of proof as to.*] Where a client refuses to pay an attorney's bill on the ground that he had been defeated and damaged by reason of the negligence and want of skill of the attorney, such negligence or want of skill must be established by him affirmatively. *Id.*

11. — *Failure to succeed.*] A failure to succeed in a law suit is not *prima facie* evidence of negligence or want of proper skill. *Id.*

12. — *Subscription for making fair grounds — destruction of grounds — right of action accruing to subscriber.*] The plaintiff and others signed a paper whereby they promised and agreed to pay to the defendant the sums set opposite their names, such subscription being for the purpose of defraying the expenses of grading, fencing, etc., a fair ground upon land belonging to defendant. The instrument provided that the subscribers should, when the net receipts of the grounds amounted to the sum subscribed by each, receive back in full the amount subscribed. Thereafter, the plaintiff paid fifty dollars to defendant, and received from him a receipt, entitling plaintiff to the privilege of driving upon the track at all times, "unless the amount so subscribed was repaid.

Defendant subsequently ploughed up and planted trees on the track, and constructed another one at a different place on his farm. In an action by the plaintiff to recover the amount paid by him, *held*, that it was not necessary for all the subscribers to join in the action, but that each might maintain a separate action.

That it was not necessary for the plaintiff to prove any special damage sustained by the breaking up of the track, but that he was entitled, in view of the fact that that sum was to be paid to him out of the net receipts of the grounds, to recover the full amount of his subscription. *HORTON v. HOWE*, 57

13. — *For payment of agent of insurance company — construction of.*] This action was brought by the plaintiff, an insurance agent, to recover the amount due upon a contract made with him by the defendant, which provided that his compensation was to be a commission upon premiums paid to the company on policies procured by him. The contract further provided that said defendant "agrees to advance to the party of the second part (plaintiff), each month, the sum of \$175, in addition to the foregoing commissions, such allowance to be charged against his commission account." It also provided that the plaintiff might, upon repaying the sums advanced under the contract, receive an additional commission on premiums.

*Held*, that the monthly advances were to be received by the plaintiff abso-

**CONTRACT — Continued.**

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lutely, in addition to his commissions, and that the same were not to be repaid by him, unless he should elect so to do in order to receive the higher commission. *HAHN v. NORTH AMERICAN LIFE INS. CO.* ..... 195

14. — *Setting aside of, for fraud — offer to restore what was received under the contract.*] Where an action is brought to set aside a contract, on the ground that the plaintiff was induced to enter into it through the fraud of the defendant, it is not necessary that the complaint should contain an offer to restore what has been received under it. *HAY v. HAY* ..... 815

15. — *Offer — when necessary to be made in the complaint.*] It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary. *Id.*

16. — *Joinder of causes of action.*] A joinder in one complaint of a cause of action, arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and of a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper. *Id.*

17. — *For carrying goods — when not confined to goods shipped on shipper's own account.*] The plaintiff, a resident of Chicago, entered into a contract with the defendant whereby the latter agreed to carry and transport from New York to Liverpool such merchandise, not exceeding a specified amount, as might be furnished by the plaintiff, during certain months, at a specified price. A portion of this merchandise was shipped by the plaintiff on his own account, and the remainder thereof was furnished by other persons, who made a contract with the plaintiff for its transportation. The bills of lading were made out at Chicago, the defendant receiving the goods at New York, paying the back freight and collecting the whole amount of freight from the assignees at Liverpool. After the making of the contract between plaintiff and defendant ocean freights increased, so that, as the bills of lading made at Chicago charged for freights at the current rates, those being the rates agreed upon between plaintiff and the parties furnishing the merchandise to him for transportation, the amount received by the defendant at Liverpool for the ocean freights exceeded the amount which, by the terms of his contract, was to be charged to the plaintiff. In an action by the plaintiff to recover this excess, over the contract rates, which had been received by the defendant, *held*, that he was entitled to recover.

*TUGMAN v. NATIONAL STEAMSHIP CO.* ..... 323

18. — *Consideration of — what sufficient to support it.*] Plaintiff and defendant being the owners respectively of two pieces of property each adjoining another lot, and fearing that the latter would be so used as to injure their property, entered into an agreement by which the plaintiff agreed to buy the lot for \$2,500, and the defendant agreed to pay him \$100 for so doing. Plaintiff having purchased the lot, brought this action to recover the \$100.

*Held*, that there was a good consideration to support the contract, and that it could be enforced. *REYNOLDS v. GUILBERT* ..... 801

19. — *Railroad company — tickets issued by — right of passenger to stop over.*] On February seventeenth plaintiff purchased from defendant at Patchogue an excursion ticket to Brooklyn which stated, "Good until three days after date. Excursion ticket," and on the same rode to Brooklyn. On the following day he took a train from Brooklyn which arrived at Babylon late at night and did not connect with any train for Patchogue. He drove to the next station east, remained there over night and in the morning took a train for Patchogue from which he was ejected by the conductor, in compliance with a regulation of the company providing that stop-over checks should not be given on excursion tickets.

*Held*, that the company were authorized to remove him, and that he was not entitled to recover, no unnecessary violence having been used.

That plaintiff, under his contract with the company, could only demand a continuous passage, and had no right to stop over at intermediate points.

*TERRY v. FLUSHING, N. S. AND C. R. R. CO.* ..... 859

20. — *Agreement to cancel — right to recover money paid under.*] The plaintiff and defendant entered into an agreement, by which the plaintiff agreed to

**CONTRACT — Continued.**

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purchase certain land from the defendant for a price therein named; the plaintiff paid a portion of such price to the defendant. Afterwards, the plaintiff being in default, an agreement, of which the following is a copy, was indorsed on each copy contract, and signed and sealed by the respective parties: "I hereby surrender all my right, title and interest under and by virtue of the within agreement to ——— for and in consideration of the sum of one dollar, the receipt whereof is hereby acknowledged, and agree that the same shall be canceled and be of no effect from this date."

In an action by the plaintiff to recover what he had paid under the contract, *held*, that he was entitled to recover. *TICE v. ZINSSER*..... 366

21. — *For building — right of owner to complete work — effect of so doing upon damages for delay.*] A building contract contained a clause authorizing the owner, upon the failure of the contractor to proceed with the work, to notify him that unless he did so proceed he should himself complete it and charge the contractor with the expense of so doing, and another clause providing that for each and every day's delay in completing the building after a date therein specified the contractor should pay the sum of five dollars as and for liquidated damages. The owner, in pursuance of the first clause, notified the contractor and completed the building himself.

*Held*, that he had thereby waived his right to claim the damages provided for in the contract, for a failure to complete the building by the specified time. *CRAWFORD v. BECKER* ..... 375

22. — *Usurious contract — by what law governed.*] The defendant signed and delivered at the city of New York a promissory note, dated at that place, whereby, three months from its date, he promised to pay to the order of B. & G. \$300 at the New York National Exchange Bank. The note was made solely for the accommodation of the payees. The note was sold in Boston, Massachusetts, by the payees at a rate of discount usurious under the laws of this State.

In an action by the plaintiff, to whom it had been transferred by the purchaser, *held*, that the question of usury was governed by the laws of this State and that the note was void. *DICKINSON v. EDWARDS*..... 405

23. — *Usurious contract — by what law governed.*] W., a resident of Connecticut, drew, in that State, a draft upon the defendant, a resident of New York, directed to him at his place of business in New York, and the same was accepted by him, payable in New York, solely for the accommodation of the drawer and returned to W., in Connecticut, with the expectation that it would be negotiated in that State. W. discounted the draft in Connecticut at the rate of three per cent per month.

In an action upon the draft brought in this State, *held*, that as the draft had no existence as a contract until discounted in Connecticut, and as the acceptor understood that it was to be used in that State, the acceptance must be regarded as a Connecticut contract; that the question of usury and its effect upon the validity of the draft was to be governed by the laws of Connecticut and not by the laws of New York, and that the mere fact that the paper was payable in this State did not render it subject to our law as to usury. *OPDYKE v. MERWIN* ..... 401

24. — *Reformation of policy of insurance.*] The plaintiff, in June, 1867, held a mortgage for \$2,500 containing the usual insurance clause. On June twenty-eighth the defendants issued to the plaintiff a policy for \$2,500 insuring her as mortgagee. In June, 1868, plaintiff took another mortgage for \$500 on the same property also containing the insurance clause. Plaintiff applied for a new policy to cover both amounts. The policy was not delivered at the time of making the application, but was subsequently received by the plaintiff and accepted without examination. This new policy contained an additional clause, providing that the company should only be liable for any deficiency that might remain after the plaintiff had exhausted the primary security. The second policy was renewed from time to time until October, 1873, when the property was destroyed by fire, and plaintiff then, for the first time, discovered that the additional clause had been inserted.

In an action by the plaintiff to reform the policy by striking out this clause, *held*, that the insertion of this clause by the defendant without notice to the

**CONTRACT — Continued.**

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plaintiff was, in legal contemplation, a fraud, and that the same should be stricken therefrom. *HAY v. STAR FIRE INS. CO.* ..... 496

25. — *Easement.*] An easement cannot be created by a parol agreement, and where the effect of such an agreement would be to give an easement in land, it is void under the statute of frauds. Yet, though such an agreement being by parol may be void as a contract, it may be valid as a license and therefore, where under such an agreement a railway company had laid down tracks on the land, they were held not to be trespassers in so doing, and that for the same reason the rails and ties laid by them did not become fixtures, and they were entitled to remove the same. *CAYUGA RAILWAY CO. v. NILES,* 170

26. — *Covenants of indemnity and covenants to perform specific acts — distinction between — Measure of damages upon loss of leasehold interest — evidence as to.*] Plaintiff and defendant's intestate entered into an agreement whereby the latter agreed, in consideration of a sum of money paid to him by plaintiff to procure the discontinuance of two foreclosure actions then pending, and to purchase certain mortgages and hold them until the expiration of a lease, owned by plaintiff, of the mortgaged premises, so that she might enjoy the use of the same during the term of the lease. The intestate having failed to purchase, two of the mortgages were foreclosed, and just as the premises were to be sold the plaintiff sold out her lease for \$625. The lease had then two years and three months to run, and all the rent, except for one year, had been paid in advance at the rate of \$500 a year.

In an action to recover damages for a breach of the agreement, *held*, that the plaintiff was not bound to wait for an actual eviction, but that the agreement was broken as soon as the intestate failed to perform the specific acts required by the agreement, viz., to purchase and hold the mortgages.

That she was entitled to recover as damages the actual value of the premises for the unexpired term of the lease after deducting therefrom the rent to be paid.

*Held*, further, that in determining the value of the use of the premises the referee was not confined to the receipts from and the expenditures upon them.

The distinction between a covenant of indemnity and a covenant to do a specific act, discussed. *HAWKINS v. MOSHER.* ..... 563

27. — *False representations — measure of damages.*] Upon the representation of the defendant that he was the owner of a bond and mortgage given by the plaintiff, and which was then overdue, the latter agreed to and did pay to the former \$120 upon his agreeing to carry the bond and mortgage for a year. Defendant did not own the mortgage, but by paying the owner of it \$100 induced him to carry it for a year. Upon the foreclosure of the mortgage this \$100 was allowed as a payment upon it.

In this action, brought by the plaintiff to recover damages occasioned by the fraudulent representation of the defendant, *held*, that plaintiff was entitled to recover the twenty dollars, not applied upon the mortgage, with interest. *SAUNDERS v. CHAMBERLAIN.* ..... 568

28. — *Mortgage to secure future advances — Advances made after attaching of subsequent lien.*] A mortgage may be executed or a judgment confessed as security for future advances, to be made in pursuance of a contemporaneous agreement, and such mortgage or judgment will be valid and effectual as against subsequent incumbrancers having notice thereof. All advances made after the attaching of a subsequent lien, by mortgage or judgment are subject to the priority of the latter lien. The object for which the mortgage is given and the amount of the advances made may be shown by parol.

*HALL v. CROUSE.* ..... 557

29. — *Assignment of life policy.*] The defendant issued a policy of insurance upon the life of one D., payable to the assured, his executors, administrators or assigns. D. transferred his interest in the policy to plaintiff for the sum of \$1,000, reserving the right to redeem, on repaying said sum with interest in one year, and during his life, but in case of his death before redeeming, the transfer to be absolute. In an action by plaintiff to recover the amount of the policy, after D.'s death, it was claimed by the defendant that the agreement was against public policy, and fraudulent as to the heirs and next of kin of the assured, as it tended to deprive them of



**CONTRACT — Continued.**

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the right to redcem. *Held*, that the agreement was valid, and should be sustained. *EDINGTON v. ÆTERNA LIFE INS. CO.* ..... 548

80. — *Undertaking — by continuing partner to secure payment of firm liability — what covered by — what constitutes a payment.* ] The plaintiff, upon dissolving a partnership, conveyed all the assets to the continuing partner, Thompson, who, having agreed to pay and discharge all firm liability, gave to the plaintiff a bond, signed by himself and the defendants, as sureties, conditioned to pay all the debts and liabilities owing by the firm, due or to become due, and to save plaintiff harmless from the payment of any and all firm debts and liabilities, of every name and nature, then owing by them. Subsequently, actions were commenced against the plaintiff and Thompson upon certain notes given by the firm. The summons was served upon Thompson alone, who engaged an attorney to appear for both, and who suffered judgment to go by default. Plaintiff, having obtained leave to open the judgment, defended the action and procured the complaint to be dismissed. This action was brought to recover the amount paid to plaintiff's attorneys for their services in defending the action, plaintiff having given his promissory note to them for the amount, which was accepted by them in payment thereof. *Held*, that the attorneys having accepted plaintiff's notes in payment of their bill, he was entitled to recover the amount as money actually paid by him. That the amount so paid was within the condition of the bond, and that the sureties were liable therefor.

*DRAKE v. PORTER* ..... 658

81. — *Repairs to boat — liability of owner for — when credit given to captain.* ] Plaintiff's intestate made repairs upon a canal boat owned by the defendant, in pursuance of orders received from the captain of the boat. Subsequently, the captain paid to the plaintiff a portion of the bill, and gave his note for the balance. The plaintiff, without returning the note, brought this action after its maturity against the defendant.

*Held*, that the acceptance of the note of the captain, without explanation, was sufficient to show that the credit was given to him, and not to the owner, and that plaintiff could not recover. *WARNER v. MILLER.* ..... 654

82. — *Not under seal, to convey lands — Covenant to stand seized — what consideration must exist for — When a contract is not enforceable by a stranger to the consideration thereof.* ] One Lydia J. Noyes, who was the owner of a farm, entered into an agreement with her husband, by which she agreed that her husband should have the use of the farm during his life; that upon his death, if she was then living, she should have the use of it for her life; and after the death of both, she agreed that one, Malvina Noyes, the child of her husband by a former wife, should have all the right and title of the said Lydia therein "in consideration of \$200, in hand paid." The agreement was not sealed.

*Held*, that the instrument purported to be a contract between husband and wife, and was void at law.

That as it was not sealed it could not operate either as a conveyance or a covenant to stand seized.

That, even if it were sealed, it could not operate as a covenant to stand seized for the benefit of Malvina, as it was not founded on a consideration of blood or marriage; and she being a stranger to any pecuniary consideration therein mentioned, could not take advantage of or enforce it.

*LOSSEE v. ELLIS* ..... 685

— *An assignment of property, in consideration of a covenant by the assignee to support the assignor, does not constitute a trust.*

*See HUNGERFORD v. CARTWRIGHT.* ..... 647

— *Legacies charged upon land — residuary legatee taking possession of land held liable for their payment.*

*See STODDARD v. JOHNSON* ..... 606

— *Policy of insurance — agreement to refer question of amount of loss to arbitration — when not enforceable — waiver of.*

*See GIBBS v. CONTINENTAL INS. CO.* ..... 611

— *For commissions on sales — construction of.*

*See RUSSELL v. CONSOLIDATED FRUIT JAR CO.* ..... 286

**CONTRACT — Continued.**

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- *Drawing-room cars — liability of railroad company hauling such cars for acts of servants therein.*  
*See* THORPE v. N. Y. CENTRAL AND H. R. R. R. Co. .... 70
- *Of surety — request that creditor will foreclose mortgage — neglect to comply with — effect of.*  
*See* NORTHERN INS. CO. v. WRIGHT ..... 166
- *Bill of exchange — what is, as distinguished from an assignment.*  
*See* HOLLISTER v. HOPKINS ..... 210
- *Note — addition of word "surety" to name of one joint maker — action, how brought thereon.*  
*See* HOYT v. MEAD ..... 327
- *Bond given by married woman — action upon — complaint in — what allegations it must contain.*  
*See* BROOME v. TAYLOR ..... 341
- *Policy of insurance — "unoccupied" — meaning of in.*  
*See* WAIT v. AGRICULTURAL INS. CO. .... 371
- *Covenants to pay taxes during term of lease — how construed.*  
*See* SKIDMORE v. HART ..... 441
- *Partnership for purchase of land — oral agreement for — liability of partners.*  
*See* WILLIAMS v. GILLIES ..... 422
- *Sale of goods — implied warranty — notice of defects.*  
*See* GAUTIER v. DOUGLASS MANUFACTURING Co. .... 514
- *Insurance of party, "as interest may appear" — effect of — loss payable to A B — entitles A B to recover the entire amount, though in excess of his individual loss.*  
*See* DAKIN v. LIV. AND LONDON AND GLOBE INS. Co. .... 123

**CONTRACTOR :***See* PRINCIPAL AND AGENT.

**CONTRIBUTORY NEGLIGENCE** — *When a question for the jury.*] 1. This action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. At Amboy the defendant had four tracks, numbered from the south 1, 2, 3 and 4; 1 and 2 being for passenger, and 3 and 4 for freight cars. Upon land adjoining the southerly tracks owned by the defendant, it had erected a station and a plank sidewalk, leading westerly about 100 feet to a highway. At the time of the accident the plank-walk was so obstructed with snow as to be impassable. East of the highway cattle guards had been constructed, the southerly two being planked over and the northerly two left open, but the two latter were, at the time of the accident, so filled and covered over with snow, as to be entirely concealed.

The plaintiff's intestate who lived on the aforesaid highway, a few rods northerly from the crossing, arrived at Amboy in the morning with two children, one about three years old and the other an infant, and was assisted from the cars on the southerly side of track No. 2; she started to walk westerly and diagonally across the tracks toward the highway, the shortest route to her house; a gravel train was approaching on track No. 3; after she had walked about fifty feet she fell into the cattle guard which was concealed by the snow, and before she could extricate herself she was run over by the gravel train and killed. If she had not so fallen she would have had time enough to cross the track before the train would have reached that point. The justice at the Circuit granted a nonsuit. *Held*, that this was error and that the case should have been submitted to the jury.

HOFFMAN v. N. Y. CENTRAL AND H. R. R. R. Co. .... 589

2. — *When question should be submitted to the jury.*] At Kirkville, on the defendant's road, the station and depot are on the north side of the track, and passengers generally get off on the north side of the cars. Along the south side of the track, and very close to it, is a ditch. The plaintiff, a resi-

**CONTRIBUTORY NEGLIGENCE** — *Continued.*

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dent of the place and well acquainted with the situation of the depot, attempted to get off the train, on the south side, at a point where the track was intersected by a highway running at right angles with it, at a time when the train had stopped or was running very slowly. The conductor, who was on the north side of the train, not seeing the plaintiff, who was on the lowest step of the car, signalled the engineer to go on, and by his so doing the plaintiff was thrown off and injured. It was proved that when the cars stopped on the highway it was not unusual for parties to alight from the cars on the southerly side of the train, which was the side nearest to the village.

*Held*, that it was error for the court to charge, as matter of law, that the attempt to alight on the southerly side of the train did not constitute contributory negligence; that whether it did or not should have been submitted to the jury. *PLOPPER v. N. Y. C. AND H. R. R. R. Co.*..... 625

8. — *In order to create liability, must contribute to or cause the accident.*] One Barringer was driving, plaintiff's intestate and himself being in a one-horse wagon, on a highway crossing defendant's rail-road. While at a safe distance therefrom they became aware of the approach of an engine, and Barringer at once endeavored to stop the horse and succeeded in checking him, he started again and was again brought under control, but started a third time and ran into the engine. The bell of the engine was not rung as required by law.

In an action to recover damages for the killing of plaintiff's intestate, *held*, that although negligence on the part of Barringer could not be imputed to the deceased, yet as defendant's neglect to ring the bell did not contribute to, or cause the accident the plaintiff could not recover.

*COBBERG v. N. Y. CENTRAL AND HUD. R. R. R. Co.*..... 829

— *Turning cows on to highway crossed by railroad track.*

*See FITCH v. BUFFALO, N. Y. AND PHIL. RY. Co.*..... 668

*See NEGLIGENCE.*

**CONVERSION** — *Of property — what evidence sufficient to establish — order of arrest for.*

*See WOODBRIDGE v. NELSON.*..... 890

— *Action for — demand — when it must be proved.*

*See RYERSON v. KAUFFIELD.*..... 887

— *When bill of particulars ordered in action for.*

*See ROBINSON v. COMER.*..... 291

— *Levy by sheriff — when sufficient to sustain replevin or action for conversion.*

*See ALVORD v. HAYNES.*..... 26

**CONVEYANCE** — *Easement of right of drainage — what words are sufficient to create.*

*See FLINT v. BACON.*..... 454

— *By married woman — under chap. 90 of 1860 — assent of husband to — effect of its not having such consent.*

*See WING v. SCHRAMM.*..... 377

**CORPORATION** — *Power of, to transfer property while it has but two trustees.*] 1. Where a corporation, created under the act of 1848, has borrowed and received money, upon an agreement to secure the same by a pledge of its goods, fails to give such pledge, but subsequently, and while it has but two trustees, transfers to the lender property owned by it, in payment thereof, a good title to the property so transferred is thereby acquired by him. *CASTLE v. LEWIS.*..... 298

2. — *Discount of note given by an officer — in violation of its charter — what is.*] This action was brought by the plaintiff, as trustee in bankruptcy of the Citizens' Savings Bank, upon two drafts drawn by a firm in New York upon a firm in Charleston, accepted by the latter firm and delivered to one Palmer who was a member of both firms. Upon his application the drafts were

**CORPORATION** — *Continued.*

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subsequently discounted by the bank, of which he was the vice-president, and of the stock of which he owned more than four shares. The drafts were drawn and accepted for the accommodation of Palmer.

The charter of the bank provided that no director or officer of said corporation should borrow or use any portion of the funds thereof, and that no loan of money should be made by it to any stockholder owning more than four shares of stock therein. It was insisted by the defendant that the drafts were void because taken by the bank in violation of the provisions of its charter. *Held*, that the prohibitions of the charter did not apply to a case in which a loan was made to a firm, corporation or association in which an officer or stockholder of the bank was a partner, stockholder or member, and that the plaintiff was entitled to recover. *FISHER v. MURDOCK*..... 485

3. — *Devise to trustees of, a devise to the corporation.*] A devise of real estate to trustees of a corporation is in legal effect a devise to the corporation, and not to the trustees as individuals. And where the corporation is capable of taking real estate by devise, it is authorized to take the property although charged with a subordinate trust in favor of the widow of the testator. *CURRIN v. FANNING*..... 463

4. — *Restrictions on devises to corporations.*] *Seem*, that the act (chap. 819 of 1848) restricting devises and bequests to certain corporations to one-fourth of the testator's estate, and to such as are made two months before the death of the testator, is not applicable to such an institution as Manhattan college in the city of New York. If it were applicable, the prohibition is repealed by chapter 860 of 1860. *Id.*

*Seem*, that in determining the one-half the estate which, under the act of 1860, can be devised to charitable or educational corporations, the widow's dower and the debts are to be first deducted. *Id.*

— *Account stated — authority of officer of corporation to make — Account rendered — what necessary to constitute it an account stated.*

See *HARVEY v. WEST SIDE ELEVATED RAILWAY CO.*..... 392

— *Service of summons upon "managing agent" of — who is not such agent.*

See *EMERSON v. AUBURN AND OWASCO LAKE R. R.*..... 150

— *Chapter 40 of 1848 — Trustees of corporation must be stockholders — how the fact that a person is a stockholder may be proved.*

See *HERRIES v. WESLEY*..... 492

— *Certificate as to the payment of the capital stock of — required to be filed by chapter 40 of 1848 — must be sworn to — Issue of stock for property purchased — liability of holders of, to creditors of corporation.*

See *BROWN v. SMITH*..... 406

See **INSURANCE COMPANY.**

**MUNICIPAL CORPORATION.**

**RAILROAD COMPANY.**

**SAVINGS BANKS.**

**COSTS** — *Demurrer — costs upon appeal to General Term.*] 1. Upon an appeal to the General Term from an order of the Special Term overruling or sustaining a demurrer to the whole or a portion of the pleading, the successful party is entitled to tax, as costs, twenty dollars before, and forty dollars for argument. *VAN GELDEN v. VAN GELDEN*..... 118

2. — *Costs at Special Term.*] Where an order is made at the Special Term sustaining or overruling a demurrer to the whole or a portion of the pleading, the successful party is entitled to the full costs of the trial of an issue of law; and where relief is granted to the unsuccessful party, it should be only upon the payment of those costs; and to grant it upon payment of ten dollars costs only is improper. *Id.*

3. — *Taxation of.*] In an action of ejectment the plaintiff recovered upon the trial before a referee; a new trial was ordered by the General Term, costs to abide the event. On the second trial defendant obtained a verdict in his favor; a new trial was granted on the ground of newly-discovered evidence, on payment of \$150, costs and disbursements of the action, and ten dollars

**COSTS — Continued.**

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costs of the motion, after payment of which a third trial was had and a verdict rendered in favor of plaintiff.

*Held*, that plaintiff was not entitled to tax costs for either the first or second trials, but only for the third. *PROVOST v. FARRELL* ..... 303

4. — *Stenographer's fees.*] Fees paid to a stenographer and for preparation of maps cannot be taxed. *Id.*

5. — *On review of special proceeding — on certiorari — Chap. 270 of 1854, § 3.*] On an appeal to the Court of Appeals, in a proceeding brought into the Supreme Court by a common law *certiorari*, directed to an officer or tribunal other than a court, the successful party is not entitled to costs as a matter of course; whether or not costs shall be awarded rests in the discretion of the court.

*PEOPLE EX REL. GREEN v. SMITH* ..... 227

6. — *Security for future costs may be taken by attorney.*] The English rule prohibiting attorneys from taking, in advance, a security for the payment of the future costs of the litigation is not in force in this State.

*HALL v. CROUSE* ..... 557

— *Of former trial — must be paid by applicant for a new trial on the ground of newly-discovered evidence.*

*See COMSTOCK v. DYE* ..... 118

— *Must be paid — when new trial is granted because of reversal of a former judgment, upon which the judgment in the principal action is based.*

*See SMITH v. FRANKFIELD* ..... 489

— *In an action to foreclose a mortgage the costs are in the discretion of the court.*

*See LOSSEE v. ELLIS* ..... 656

**COUNTY — Liability of, for negligence of county treasurer.**] In the year 1875 the plaintiff purchased certain lots of land in the town of Jamaica at a sale, for non-payment of taxes, held by the county treasurer of Queens county, in pursuance of chapter 135 of 1873, and received certificates therefor. The county treasurer failed to serve the notices of redemption upon the owners and mortgagees, as required by the act. After the time for redemption had expired, the plaintiff, his certificates not having been redeemed, tendered them back to the county treasurer and demanded his money, on the ground that the failure of the county treasurer to serve the notices rendered the certificates void.

In an action by him to recover said amount from the county, *held*, that the county was not liable for any loss or damage which might have occurred by reason of the default or negligence of the county treasurer in the discharge of the duties of his office.

That the relation of master and servant did not exist between the county and its county treasurer.

That in conducting the said sale the county treasurer was not in any sense acting on behalf of the county, but was simply discharging certain duties in relation to the unpaid taxes of the town of Jamaica, imposed upon him by the law under which the sale was had.

*DE GRAUW v. SUPERVISORS OF QUEENS CO.* ..... 381

**COUNTY COURT — Appeal from a judgment entered on the report of a referee in the County Court — it is not necessary to move for new trial in the County Court.**] Under the provisions of the Code of Civil Procedure an appeal will lie to the General Term from a judgment entered upon the report of a referee, in an action pending in a County Court, upon a case and exceptions settled by such referee; and a prior motion for a new trial in the County Court, upon the exceptions and the decision of the referee, is no longer requisite or proper.

*KILMER v. O'BRIEN* ..... 224

— *Return by justices on appeal to — truthfulness of, cannot be questioned.*

*See BARBER v. STETTHEIMER* ..... 199

**COUNTY JUDGE — Court of General Sessions — absence of two justices — power of county judge to receive a verdict.**] The plaintiff in error was tried at a Court of General Sessions for grand larceny. After the jury had retired to

**COUNTY JUDGE** — *Continued.*

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consider their verdict both of the justices sitting with the county judge left the court room, and one of them left the building. While they were absent the jury came in and the county judge received their verdict of guilty. The jury were polled at the request of the prisoner's counsel, without any objection on his part to the reception of the verdict, in the absence of the two justices.

*Held*, that the county judge had no power to receive the verdict and that the conviction or sentence must be set aside. **HINMAN v. PEOPLE**..... 266

**COUNTY TREASURER** — *Liability of county for negligence of — in failing to serve notice to redeem on tax sale.*

*See* **DE GRAUW v. SUPERVISORS OF QUEENS CO.**..... 381

**COURTS** — *Removal of action to Federal court.*] To authorize the removal of an action from a State court to a Federal court it is not sufficient that it is alleged that the defendant was an alien, a citizen or subject of a foreign State or country at the time the petition for such removal was prepared, but it must appear that such was the fact at the time of the commencement of the action. **TUGMAN v. NATIONAL STEAMSHIP CO.**..... 332

**COURT OF SPECIAL SESSIONS** — *Jurisdiction of — trial by jury in.*

*See* **PEOPLE EX REL. MURRAY v. SPECIAL SESSIONS**..... 533

**COVENANTS** — *Of indemnity and covenants to perform specific acts — distinction between discussed — Measure of damages.*

*See* **HAWKINS v. MOSHER**..... 563

**CREDITOR :**

*See* **DEBTOR AND CREDITOR.**

**CRIMINAL LAW** — *Court of General Sessions — absence of two justices — power of county judge to receive a verdict.*

*See* **HINMAN v. PEOPLE**..... 266

— *Court of Special Sessions — jurisdiction of — jury trial in.*

*See* **PEOPLE EX REL. MURRAY v. SPECIAL SESSIONS**..... 533

— *Challenges to jurors — impression as to guilt — when it does not render a juror incompetent.*

*See* **GREENFIELD v. PEOPLE**..... 242

[— Look under name of particular crime.]

**DAMAGES** — *Measure of — for destruction by its maker of an outlawed note — presumption as to pleading the statute of limitations.*] 1. This action was brought by the plaintiff against her brother, for the conversion of a note given to her for money borrowed by him. After the lapse of more than six years from the maturity of the note, he asked her to let him see it, promising to return it. Having obtained possession of it, he threw it into the stove and burned it up. The justice at the Circuit charged, with reference to the amount of damages, that the plaintiff was entitled to recover the face of the note with interest; that, though outlawed, it constituted a moral obligation sufficient to uphold a new note or promise; that, although the defendant could have pleaded the statute of limitations in an action upon the note, yet being a wrong-doer, he was entitled to no presumptions in his favor.

*Held*, that the charge was correct. **OUTHOUSE v. OUTHOUSE**..... 180

2. — *Excessive — setting aside of verdict because of.*] An action was brought to recover damages for injuries sustained by the plaintiff while crossing one of defendant's (a railroad company's) tracks, and alleged to have been caused by its defective condition. Upon the trial it appeared that, prior to the accident, plaintiff had worked on a farm and could do any work connected therewith; that by the accident his right leg was broken near the hip; that he was confined to his bed from the time of the accident in July to October first; was placed in a special bed and his leg kept extended by proper appliances for eight weeks; that his right leg was one inch and a-half shorter than the other; that he could go over even ground with one crutch; and had mowed on a mowing-machine, raked with a horse-rake, and driven his team on the

**DAMAGES** — *Continued.*

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road somewhat, but was not able to do much farm work; that the injury was permanent and he could never recover therefrom. The jury rendered a verdict in his favor for \$14,000. *Held*, that the verdict would not be set aside as excessive. *GALE v. N. Y. CENTRAL AND H. R. R. Co.*..... 1

3. — *Building contract—right of owner to complete work—effect of so doing upon damages for delay.*] A building contract contained a clause authorizing the owner, upon the failure of the contractor to proceed with the work, to notify him that unless he did so proceed he should himself complete it and charge the contractor with the expense of so doing, and another clause providing that for each and every day's delay in completing the building after a date therein specified the contractor should pay the sum of five dollars as and for liquidated damages. The owner, in pursuance of the first clause, notified the contractor and completed the building himself. *Held*, that he had thereby waived his right to claim the damages provided for in the contract, for a failure to complete the building by the specified time. *CRAWFORD v. BECKER* ..... 375

4. — *Measure of, on sale of bonds procured by fraudulent representations.*] The defendants having, by false and fraudulent representations, induced the plaintiff to purchase certain railroad bonds, he, upon discovering the fraud some three years after the purchase, brought this action to recover the damages occasioned thereby. The defendants were acting as brokers, for both the purchasers and the sellers. Upon the trial the court charged, as to the measure of damages, that the plaintiff was entitled to recover the actual damages which resulted from defendants' conduct up to the time when he first discovered the fraud—the difference between the sum paid and the value of the stock—that is, the difference between the price paid and the actual value of the bonds at the time when the plaintiff discovered the fraud. *Held*, that the charge was incorrect; that the measure of damages was the difference between the actual value of the bonds at the time of the sale and their value as they were represented to be. *WYETH v. MORRIS* ..... 338

5. — *Exemplary—when not allowable.*] The plaintiff, in pursuance of a contract made with the defendant, claimed to be entitled, by virtue of a commutation ticket, to ride to East New York. Having exercised this right for some time the defendant refused to carry him to that point unless he would pay extra fare from Jamaica to East New York; and upon his refusal so to do, in obedience to an order of the defendant, the conductor ejected him from the train, using, in so doing, no unnecessary violence. Upon the trial of this action, brought to recover damages for so doing, the court charged that the evidence was not sufficient to give punitive damages against the conductor, but that plaintiff was entitled to have the railroad, company punished to such an extent as the jury should, in their discretion say the facts authorized and demanded. *Held*, that the charge was erroneous. *PARKER v. LONG ISLAND R. R. Co.* ..... 319

— *Taking land for railroad purposes—compensation to landowner—how measured.*  
*See MATTEE OF PROSPECT PARK AND CONEY ISLAND R. R. Co.*..... 345

— *Right of action accruing from destruction of fair grounds, paid for by subscriptions, to be refunded from earnings of the grounds—special damages need not be shown.*  
*See HORTON v. HOWE* ..... 57

— *Measure of damages, upon loss of leasehold interest—evidence as to—distinction between a covenant of indemnity and a covenant to do a specific act.*  
*See HAWKINS v. MOSHER* ..... 563

**DAMNUM ABSQUE INJURIA** — *Mill owners—rights of, as to detention of water.*] 1. The defendant was the owner of a dam, and drew therefrom water to run his mill, and the plaintiff drew water from a dam situated on the same stream, below that of the defendant. The surplus waters from defendant's dam was sufficient to furnish the supply needed for the plaintiff's mill, except in times of drought, when defendant was obliged to shut the gates of his mill during the night to accumulate a supply for the next day, thereby cutting off the supply from plaintiff's mill during the

**DAMNUM ABSQUE INJURIA** — *Continued.*

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time defendant's reservoir was filling. Defendant's mill was run only during the day, while that of plaintiff was run night and day. In an action brought to restrain the defendant from cutting off the flow of water during the night, the referee found that the detention was necessary, and for the sole purpose of enabling the defendant to propel its machinery during the day, and that such detention and use of the water was reasonable. *Held*, that the injury sustained by the plaintiff, by reason of such detention, was one for which the law afforded no remedy.

BULLARD v. SARATOGA VICTORY MFG. CO. .... 43

2. — *Burden of proof as to the amount used.*] The plaintiff was only entitled to the use of a limited quantity of water. *Held*, that it rested upon him to show that the quantity used by him was less than that to which he was entitled. *Id.*

**DEATH** — *Of attorney during pendency of action — services rendered by attorney in such action, how compensated.*

See SEYMOUR v. CAGGER ..... 29

— *Declaration by doctor as to cause of — in an action upon a policy of insurance.*

See MCNAIR v. NATIONAL LIFE INS. CO. .... 144

**DEBTOR AND CREDITOR** — *Surety — request that creditor will foreclose mortgage — neglect to comply with — effect of.*] 1. The defendant being the owner of a bond and mortgage, dated September 28, 1869, for \$4,400, \$500 of principal being payable on January first of each year from date, assigned the same on September 26, 1873, guaranteeing that the security was sufficient for the payment of the amount thereof, and guaranteeing also the collection of the same. In January, 1873, several installments of principal being due and unpaid the secretary of the plaintiff, who then held the bond and mortgage under such assignment and guarantee, wrote to the defendant in regard to it. The defendant called at the office and notified the secretary that he wanted the company to foreclose the said mortgage. The company neglected to foreclose the mortgage until October 13, 1875. In the meantime a frame dwelling, worth \$2,000, had burned down, and only \$700 of insurance was received thereon.

A deficiency having arisen upon the sale, for which it was sought to hold the defendant liable, *held*, that the act of the company in failing, for more than two years, to foreclose the mortgage, after defendant had requested it so to do, relieved him from all liability for the deficiency which had arisen. NORTHERN INS. CO. v. WRIGHT. .... 166

2. — *Action brought by one creditor in behalf of himself and others — who bound by.*] Where an action is brought by some of the creditors of a debtor, in behalf of themselves and all others similarly situated who shall come in and contribute to the expenses of the action, none but the plaintiffs therein acquire any vested interest in such action, or are bound thereby, until a final judgment has been entered therein. DERBY v. YALE ..... 273

3. — *Corporation — power of, to transfer property while it has but two trustees.*] Where a corporation, created under the act of 1848, has borrowed and received money, upon an agreement to secure the same by a pledge of its goods, and has failed to give such pledge, but subsequently, and while it has but two trustees, transfers to the lender property owned by it, in payment thereof, a good title to the property so transferred is thereby acquired by him. CASTLE v. LEWIS. .... 296

— *Compromise under bankrupt act — contingent liabilities not discharged by.*  
See SMITH v. KRAUSKOPF. .... 526

— *Supplementary proceedings — code § 293 — order requiring judgment debtor to apply his property to the satisfaction of a judgment.*  
See FIRST NATIONAL BANK v. WILSON. .... 233

— *A note in order to have the effect of extending the time of payment of a past due debt must be negotiable.*  
See WEBSTER v. BAINBRIDGE. .... 180



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- *Assignee in bankruptcy* — actions by — jurisdiction of State courts over.  
*See TULLIS v. MILLER*..... 363
- *Trustees of insolvent debtor* — reference of claims by — procedure on application for — 3 R. S. [6th Ed.], 39, §§ 21, 22.  
*See WICKHAM v. FRAZER*..... 481
- *General assignment* — failure of assignee to give a bond — effect of — chapter 348 of 1860, and chapter 56 of 1875.  
*See HENNESSY v. CONNOLLY*..... 173
- *What must be done by creditor before he can attack a fraudulent conveyance by a non-resident debtor.*  
*See BALLOU v. JONES*..... 629
- *Suit by creditor against bankrupt* — when bankruptcy proceedings determined so as to justify — Right of surety to be substituted in place of creditor whose claim he has paid.  
*See MILLER v. O'KAIN*..... 594

**DECLARATIONS** — *Of insured (the assignor of life policy) — not admissible against his assignee.*

*See EDINGTON v. ÆTNA LIFE INS. CO.*..... 543

**DEED:**

*See CONVEYANCE.*

**DEFECTIVE VERIFICATION** — *Return of an answer because of a defective verification — the notice must point out the defect.*

*See SNAPE v. GILBERT*..... 494

**DEFECT OF PARTIES** — *Any defect of parties plaintiff, arising from the omission of the plaintiff to join his co-administratrix with him, is waived by the failure of the defendant to set up the defect in his answer.*

*See RISLEY v. WIGHTMAN*..... 163

**DEFENSE** — *Of usury in bond and mortgage — by whom after the conveyance of the property it may be set up.*

*See KNICKERBOCKER LIFE INS. CO. v. NELSON*..... 321

— *When good faith of person receiving, a defense to an action for enticing a wife from her husband.*

*See SMITH v. LYKE*..... 204

**DEFINITION:**

- “*Adverse party*” — meaning of under Code, § 348.  
*See YATES v. BURCH*..... 622
- “*Canal boat*” — when a vessel within meaning of chapter 482 of 1862.  
*See FRALICK v. BETTS*..... 632
- “*Unoccupied*” — meaning of, in policy of insurance.  
*See WAIT v. AGRICULTURAL INS. CO.*..... 371
- *GIBBS v. CONTINENTAL INS. CO.*..... 611
- “*Vessel*” — when canal boat is, within meaning of chap. 482 of 1862.  
*See FRALICK v. BETTS*..... 632

**DEMAND** — *When it must be proved in an action for conversion.*

*See RYERSON v. KAUFFIELD*..... 387

**DEMURRER** — *Costs upon appeal to General Term*] 1. Upon an appeal to the General Term from an order of the Special Term overruling or sustaining a demurrer to the whole or a portion of the pleading, the successful party is entitled to tax, as costs, twenty dollars before, and forty dollars for argument. *VAN GELDER v. VAN GELDER*..... 118

2. — *Costs at Special Term.*] Where an order is made at the Special Term sustaining or overruling a demurrer to the whole or a portion of the pleading, the successful party is entitled to the full costs of the trial of an issue of law; and where relief is granted to the unsuccessful party, it

**DEMURRER** — *Continued.*

PAGE.

should be only upon the payment of those costs; and to grant it upon payment of ten dollars costs is improper. (*Id.*)

— *Action of partition — allegations of complaint — non-compliance with Rule 78 of 1876 — where the allegation is defective because of its uncertainty, the remedy is by motion, and not by demurrer.*

See *MOFFETT v. McLAUGHLIN*..... 449

**DEPOSITS** — *Made by savings banks with other banks — priority given to, applies to deposits made prior to 1875, and to interest thereon — chapter 371 of 1875.*

See *UPTON v. NEW YORK AND ERIE BANK*..... 269

**DESTRUCTION** — *By its maker, of an outlawed note — measure of damages for — presumption as to his pleading the statute of limitations.*

See *OUTHOUSE v. OUTHOUSE*..... 130

**DETENTION OF WATER** — *Rights of one mill owner as to others.*

See *BULLARD v. SARATOGA VICTORY MANUFACTURING CO.*..... 43

**DEVISE** — *To alien — partition action for.*] 1. An action for partition may be brought, under the act of 1853, relating to disputed wills, when the property sought to be partitioned was devised, in the will of the testator, to a devisee who was incompetent to take by devise because of alienage.

*HALL v. HALL*..... 306

2. — *Filing of deposition, under chapter 115 of 1845 — effect of naturalization.*] A testator devised certain real estate to his sister and her husband, for their joint lives and the life of the survivor, with remainder to the children of the sister. All these children were aliens at the time of the testator's death, and had not filed the deposition required by the laws of this State, to enable them to hold such real estate, but one of them filed the deposition as required by the act of 1845 (chap. 115), and all were naturalized prior to the death of their mother.

*Held*, that upon the death of the testator, this sister and her husband took an estate for life in the property.

That the devisees of the estate in remainder being incompetent to take, such estate vested in the citizen heirs of the testator, subject to be defeated by the filing by the devisees of the deposition provided for in section 1 of chapter 115 of 1845.

That upon the filing of such deposition by the said devisees, the estate of the heirs would divest, and the same would vest in the devisees named in the will.

Section 11 of the said act excepts from its operation only those interests which had become vested prior to its passage. (*Id.*)

3. — *Chapter 38 of 1875.*] That the omission of two of the devisees to file the deposition was cured by chapter 38 of the Laws of 1875, conferring upon heirs and devisees, being of the blood of the devisor, whether citizens or aliens, capacity to take and hold the real estate owned and held by the devisor at the time of his decease — except as against the State only; the act of 1875 being retroactive in its operation. (*Id.*)

4. — *To corporation.*] A testator devised certain real estate to the trustees of Manhattan College, in the city of New York, and their successors, forever. *Held*, that the devise of the real estate was, in legal effect, to the Manhattan College, and not to the trustees as individuals.

*CURRIN v. FANNING*..... 463

**DEVISEE** — *Usury — action by devisee of mortgagor, to set aside a mortgage on the ground of — plaintiff must first offer to pay the amount loaned to his ancestor.*

See *MARSH v. HOUSE*..... 126

**DISCHARGE** — *Of mortgage by mortgagee, after assignment of, after record of the assignment — its discharge on the record by the register does not affect the rights of the assignee.*

See *HEILBRUN v. HAMMOND*..... 474

**DISCONTINUANCE** — *When it should not be allowed.*] After the evidence in a case has been agreed upon and submitted to the justice trying the same, and a motion to open the case and take further evidence has been denied by him, a discontinuance of the action should not be allowed.

CLEARWATER v. DECKER ..... 68

**DIVORCE** — *Decree, when void because fraudulently obtained.*] In proceedings instituted against the relator before a police justice in the city of New York for abandoning his wife and children the defense was an absolute divorce procured by him in Utah. The decree, which was granted November 8, 1876, showed that the relator appeared by counsel; that the wife did not appear in person or by counsel, but had been served by publication; that a decree was taken by default on the ground "that the said parties could not live in peace and union together and their welfare requires a separation, and that the plaintiff wishes to become a resident of Beaver county, in the territory of Utah." The wife testified that her husband left his family in Brooklyn, in September, 1876, telling her that he was going to Cincinnati to open a sewing machine agency; that she was never in Utah and never knew of the suit until a copy of the decree was served upon her in December, 1876. *Held*, that the decree was fraudulently obtained and was an absolute nullity.

PEOPLE EX REL. COMMISSIONERS v. SMITH ..... 414

**DOGS** — *Right of owner of land to drive off trespassing animals with.*

See SMITH v. WALDORF ..... 127

**DRAINAGE** — *Right of — what words are sufficient to create easement for.*]

1. Previous to November 1, 1861, one Dowley was the owner of, and had built houses upon lots Nos. 31, 33, 35 and 37 Broadway, New York, the drainage from Nos. 31 and 33 being conducted into and through a pipe passing through lots 35 and 37. November 1, 1861, Dowley, by a deed containing covenants of warranty and for quiet enjoyment, conveyed the lots 31 and 33 to M., "as the same are now built upon and in the occupancy of the said party of the second part," "to have and to hold the same with the appurtenances." On November 25, 1861, D. conveyed lots 35 and 37 to one H., "as the same are now inclosed, built upon and occupied." H. had no actual knowledge that the drain-pipe from M.'s premises ran through his, and the same was not observable upon ordinary inspection.

*Held*, that the premises conveyed to H. were subject to an easement in favor of M., to use the pipe laid therein for the purpose of drainage.

FLINT v. BACON ..... 454

2. — *Increase of use.*] The mere fact that one having, for his building as then occupied, a right of drainage under the lot of another, increases largely, by reason of changes in the use of his building, the amount of refuse matter discharged into, and passing through such drain, does not affect his right to enjoy such easement where the passage through such drain is not obstructed nor the drain injured by such increased use thereof. *Id.*

**DRAWING-ROOM CARS** — *Liability of railroad company hauling drawing-room cars under contract with car company.*]

The defendant entered into a contract with Webster Wagner, by which Wagner agreed to place upon defendant's road certain drawing-room cars at his own cost and keep the interiors thereof in good order, Wagner's conductors and porters thereon to be carried free of charge by the railroad company. The defendant's conductors had a right to enter the cars for any purpose connected with the management of the train, and for the collection of fares, and to the assistance of Wagner's conductors and porters in enforcing good order; but not otherwise to interfere with the business of such cars. In consideration of the railroad company hauling and making certain repairs to the cars, Wagner agreed to pay it twenty per cent of the gross receipts.

In an action brought by the plaintiff against this defendant, the railroad company, to recover for injuries sustained by reason of his alleged wrongful removal from the drawing-room car by the porter thereof, *held*, that the defendant was liable for any injuries so sustained by him.

THORPE v. N. Y. CENTRAL AND H. R. R. Co ..... 70

**EASEMENT** — *Right of the owner of, to repair the way over another's land.*]

1. Where one has a right of way over the lands of another, he may do whatever is suitable and proper to put the said way in good order, provided it be done without unnecessary inconvenience to the owner of the fee.

*McMILLEN v. CRONIN* ..... 68

2. *Cannot be created by parol agreement— not to be performed under one year.*] The defendant's assignor having a five years' lease of certain lands, upon which was a stone quarry, entered into a parol agreement with plaintiff's assignor, by which the latter, a railroad company, were to lay a side track to the quarry over the leased land, and were to be allowed to take such loose dirt and stone as they might need for their road, for which they were to pay plaintiff's assignor \$100 per year, and he was to use the side track to ship his stone. The agreement was to continue during the term of the lease. Subsequently the plaintiff, having become vested with all the rights of the first company, paid fifty dollars on account of the rent and used the side track to draw stone and dirt. Thereafter, desiring to abandon the agreement and take up the tracks, they were prevented by the defendant from removing the same.

In this action of replevin, brought by the railroad company to recover the iron and ties and for damages for the detention of the same, *held*, that the effect of the agreement would be to give the company an easement in the land upon which the tracks were laid, and that, as it was a parol agreement, it was void under the statute of frauds.

That it was also void, because it was a contract not to be performed within one year. *CAYUGA RAILWAY CO. v. NILES* ..... 170

3. — *When it inures as a license.*] That the agreement, though void as a contract, was valid as a license; the company were not therefore trespassers in laying the tracks thereunder, and that for that reason the rails and ties so laid down did not become fixtures. *Id.*

4. — *Right of drainage— what words are sufficient to create.*] Previous to November 1, 1861, one Dowley was the owner of, and had built houses upon lots Nos. 31, 33, 35 and 37 Broadway, New York, the drainage from Nos. 31 and 33 being conducted into and through a pipe passing through lots 35 and 37. November 1, 1861, Dowley, by a deed containing covenants of warranty and for quiet enjoyment, conveyed the lots 31 and 33 to M., "as the same are now built upon and in the occupancy of the said party of the second part," "to have and to hold the same with the appurtenances." On November 25, 1861, D. conveyed lots 35 and 37 to one H., "as the same are now inclosed, built upon and occupied." H. had no actual knowledge that the drain-pipe from M's premises ran through his, and the same was not observable upon ordinary inspection.

*Held*, that the premises conveyed to H. were subject to an easement in favor of M., to use the pipe laid therein for the purpose of drainage.

*FLINT v. BACON* ..... 454

5. — *Increase of use.*] The mere fact that one having, for his building as then occupied, a right of drainage under the lot of another, increases largely, by reason of changes in the use of his building, the amount of refuse matter discharged into, and passing through such drain, does not affect his right to enjoy such easement where the passage through such drain is not obstructed nor the drain injured by such increased use thereof. *Id.*

**EJECTMENT** — *When the proper remedy— and not an action in equity, to remove a cloud on title.*

*See BOCKES v. LANSING* ..... 38

**EMINENT DOMAIN** — *Taking land for railroad purposes— compensation to landowners.*] 1. Under an act of the legislature certain land was taken to be used as a highway, one section of the act gave a license to a railroad company to lay their track thereon and use the same. This license was subsequently declared invalid, because no compensation was made to the owners for the additional burden thereby imposed upon their lots.

In a proceeding instituted by the company to acquire title to the land under the general railroad act, *held*, that the commissioners to appraise

**EMINENT DOMAIN** — *Continued.*

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damages should regard the land in the avenue as still forming a part of the parcels to which it had belonged, but subject to the easement of a highway, and should award as damages the difference between the market value of the whole property from which the railroad was to be severed, before the taking, and its value after the taking, with the railroad upon the land taken.

MATTER OF PROSPECT PARK AND CONEY ISLAND R. R. Co. .... 845

— 2. *Acquisition of fee of land by city — uses to which it may apply it.* By chapter 547 of 1864, the city of Buffalo was authorized to lay out a public ground for the purpose of maintaining and protecting a sea-wall or breakwater along the shore of Lake Erie, and to acquire title in fee to the necessary lands by compulsory proceedings and by conveyances. The act provided that, upon payment or tender to the owner of the compensation awarded for said land, the fee thereof should vest in the city for the said purpose. Subsequently, the defendant, acting in pursuance of a permit from the common council, laid its track upon the said land and used the same for its road. This action of ejectment was brought by the plaintiff, who owned a portion of the land when it was taken by the city, claiming that the city could confer, and the plaintiff acquire, no right to use the land for that purpose; and that, as against defendant, plaintiff was entitled to its possession.

*Held*, that as the fee was vested in the city, and as, under no circumstances, could the land revert to the plaintiff, he had no greater right to complain of the use of the land by the defendant than any other citizen. That in any event an action in ejectment could not be maintained.

SWEET v. BUFFALO, N. Y. AND PHIL. RY. Co. .... 648

**ENGINE:**

*See* LOCOMOTIVE.

**ENTICING WIFE** — *From husband — right of action for — good faith of person receiving — when a defense.*

*See* SMITH v. LYKE. .... 204

**EQUITABLE ACTION** — *To remove a cloud on title — when not maintainable — Remedy by ejectment.* The plaintiff herein claimed that one George Webster, the owner of a house and lot described in the complaint herein, on September 26, 1846, made a general assignment of all his property, including the house and lot in question, to one Russell, who, on May 6, 1847, conveyed the same to Simeon D. Webster; that thereafter, and on July 6, 1859, the said George and Eleanor, his wife, conveyed the said premises to the said Simeon D.; that the plaintiff had succeeded to the rights of the said Simeon D.; that on April 18, 1861, a receiver, appointed in supplementary proceedings, instituted by a judgment creditor of George Webster, sold the said land to one Humphrey, through whom the defendants, who are in possession thereof, claim title.

This action was brought to have the receiver's deed set aside as irregular, and canceled, and for an accounting as to the rents and profits received by the defendants. *Held*, that the facts of the case would not sustain an action in equity, such as the present one, to set aside the deed as a cloud upon plaintiff's title; but that the plaintiff's remedy, if any, was by ejectment.

BOCKES v. LANSING ..... 38

**EQUITY** — *Action in, lies to annul a bond and mortgage procured by fraudulent representations.*

*See* RANNEY v. WARREN. .... 11

— *Purchase by agent of demand against principal — upon what terms a court of equity will set it aside.*

*See* O'GRADY v. COE. .... 596

**ESTOPPEL** — *Must be certain.* 1. In 1832 E. Edmonston died, being then in possession, as was claimed, of a farm of 100 acres, leaving him surviving his widow and seven children, who continued in possession of the farm until 1844, when, by agreement, the east half was conveyed to the heirs in fee, and the west half to the widow, but whether in fee or for life was in dis-

**ESTOPPEL** — *Continued.*

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pute. The widow died in 1869, leaving a will by which she devised all her estate to her daughter, the defendant herein.

Upon the trial of this action, brought by one of the children against the daughter, to recover his share of the west half, the daughter claimed that the west half belonged to the mother in fee, by gift from her brother, who was a tenant in common of the farm with her father, and that during the lifetime of the latter he had set apart the west half of the lot to the mother.

In the deeds of the east half, made in 1844, the lots were described as "being lot No. —, in the subdivision of the east half of the farm of Elijah Edmonston, late of Phelps aforesaid, deceased, *owned and occupied at his death*." The plaintiff claimed that the widow, by executing deeds containing the words in italics, was estopped from denying that the whole lot belonged to her husband at the time of his death.

*Held*, that the words were too indefinite and uncertain to constitute an estoppel, as they might be construed as meaning that the east half only belonged to the husband. EDMONSTON v. EDMONSTON ..... 133

2. — *Effect of words, when part of description of real property.*] That as the words in question were part of a description of premises, already sufficiently described, no estoppel was created by them. *Id.*

3. — *It does not apply to collateral actions.*] That even if they did constitute an estoppel, it was limited to questions arising on the deed itself, and would not apply to a collateral action, such as the present one, not founded upon the deed. *Id.*

4. — *Declaration of person in possession of land.*] That the declarations of the widow as to her title were admissible, as tending to characterize her possession, and to show that it was claimed under a title adverse to that of the heirs of Elijah Edmonston. *Id.*

5. — *Forgery of negotiable paper — when person signing it is estopped from denying its genuineness.*] In 1874 a promissory note made by one George W. Carpenter, a son of the defendant, and indorsed by the latter, was transferred to one McKee, who stated to the defendant that he had transferred it to one Hamlin, and that Hamlin said he wished defendant had signed it on its face. Subsequently Hamlin saw the defendant, and the latter having agreed to sign the note on the face, Hamlin produced the note, now in suit, and defendant signed it as surety. Subsequently the note was transferred to other persons and purchased by the plaintiff before maturity, and in good faith. Upon the trial of this action, brought upon the note, it appeared that the note signed by defendant was not the note originally indorsed by him, but was a copy thereof, upon which the signatures and indorsements had been forged by McKee. Defendant interposed this as a defense, alleging that at the time of signing his name at Hamlin's request, he made no examination of the note, because the face looked just like the one he had signed, and he supposed it was the same.

*Held*, that the defendant having had full opportunity to examine the note as to its character and genuineness, and having failed so to do, preferring to rely upon the statements of McKee and Hamlin, he could not interpose such a defense in an action by one who purchased the same in good faith before maturity. MOSHER v. CARPENTER ..... 602

**EVIDENCE** — *Action upon a policy of insurance — Declaration by doctor as to cause of death — admissibility of.*] 1. This action was brought to recover upon a policy of insurance, issued by the defendant upon the life of the son of the plaintiff's assignor, for her benefit. In the application for insurance, signed by the son and plaintiff's assignor, in answer to a question as to the cause of his father's death, he stated "don't know." Upon the trial it was claimed by the defendant that the father died of consumption and that this fact was known to the plaintiff's assignor. Upon the examination of the plaintiff's assignor she was questioned as to the disease by which her husband died, and answered: "The doctors called it torpor of the liver and disease of the stomach and heart." It appeared that both of the physicians who had attended the husband were dead at the time of the trial. The defendant claimed that the

**EVIDENCE** — *Continued.*

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evidence as to the statements of the doctors was inadmissible, as being mere hearsay.

*Held*, that the evidence was admissible as bearing upon the question of fact, whether or not the witness knew the disease with which her husband was afflicted and of which he died.

That the declaration was also admissible, as having been made by the doctors in the ordinary discharge of their professional duties.

McNAIR v. NATIONAL LIFE INS. CO. .... 144

2. — *Estoppel — must be certain.*] In 1832 E. Edmonston died, being then in possession, as was claimed, of a farm of 100 acres, leaving him surviving his widow and seven children, who continued in possession of the farm until 1844, when, by agreement, the east half was conveyed to the heirs in fee, and the west half to the widow, but whether in fee or for life was in dispute. The widow died in 1869, leaving a will by which she devised all her estate to her daughter, the defendant herein.

Upon the trial of this action, brought by one of the children against the daughter, to recover his share of the west half, the daughter claimed that the west half belonged to the mother in fee, by gift from her brother, who was a tenant in common of the farm with her father, and that during the lifetime of the latter he had set apart the west half of the lot to the mother.

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*Held*, that the words were too indefinite and uncertain to constitute an estoppel, as they might be construed as meaning that the east half only belonged to the husband. EDMONSTON v. EDMONSTON. .... 183

8. — *Effect of, when part of description of real property.*] That as the words in question were part of a description of premises already sufficiently described, no estoppel was created by them. *Id.*

4. — *It does not apply to collateral actions.*] That even if they did constitute an estoppel, it was limited to questions arising on the deed itself, and would not apply to a collateral action, such as the present one, not founded upon the deed. *Id.*

5. — *Declaration of person in possession of land.*] That the declarations of the widow as to her title were admissible, as tending to characterize her possession, and to show that it was claimed under a title adverse to that of the heirs of Elijah Edmonston. *Id.*

6. — *As to stockholders of a corporation.*] Section 25 of chapter 40 of the Laws of 1848, providing that the book containing the names of the stockholders which the company is required to keep, "shall be presumptive evidence of the facts therein stated in favor of the plaintiff, in any suit against any stockholder," does not make such book the only or even the best evidence of the fact that the defendant was a stockholder. HERRIES v. WESLEY, 492

7. — *Parol, to vary writing.*] In an action upon a note, an agreement that the defendant shall not be liable thereon according to the terms thereof, but only for so much as he shall receive upon a bond and mortgage given in exchange therefor, cannot be established by parol. BURHANS v. CARTER... 153

8. — *Res gestæ — what statements do not constitute part of.*] This action was brought to recover the amount alleged to be due to the plaintiff upon a sale of certain real estate made by his assignor to the defendant. Upon the trial the person who drew the deed was called as a witness and stated, against the defendant's objection and exception, that the grantor, at the time he was executing the deed (the grantee not being present) stated to the witness that the purchase-price had not been paid, but that the grantee had promised to pay it whenever he should be requested so to do. *Held*, that the statement did not constitute a part of the *res gestæ*, and should have been excluded.

TRIMMER v. TRIMMER. .... 182

9. — *Memoranda — when admissible.*] Upon the trial of this action,

**EVIDENCE — Continued.**

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brought by the plaintiff to recover for the breach of a contract made with her by the defendant's predecessor, the principal issue of fact was as to the genuineness of the signature of the school commissioner, Strough, to a certificate that she was qualified to teach. Upon the trial Strough was called as a witness, and testified that to the best of his knowledge and belief he did not sign or issue the certificate. He also testified that he kept a book, in which he entered the certificates issued by him during the month in which the certificate in question bore date. The counsel for defendant produced this book and offered it in evidence to show that it contained no entry of the certificate in question. Upon plaintiff's objection, the book was excluded. *Held*, that its exclusion was error.

The counsel for defendant asked Mr. Strough whether, during his term of office, he was accustomed to issue such certificates except upon a personal examination of the applicant, which question was, upon the objection of plaintiff's counsel, excluded. *Held*, that this was error.

MORROW *v.* OSTRANDER..... 219

10. — *Negligence of attorney — not presumed from failure to succeed.*] Where a client refuses to pay his attorney's bill of costs, on the ground that he had been defeated and damaged by reason of the negligence and want of skill of his attorney, such negligence or want of skill must be established by him affirmatively, and it will not be presumed, as failure to succeed in a law suit is not *prima facie* evidence thereof. SEYMOUR *v.* CAGGER..... 29

11. — *Burden of proof.*] Where a party was only entitled to the use of a limited quantity of water for a stream for mill purposes. *Held*, in an action brought against a neighboring mill-owner to prevent the latter's use of the water of the stream, that it rested upon the former to show that the quantity used by him was less than that to which he was entitled.

BULLARD *v.* SARATOGA VICTORY MFG. CO..... 43

12. — *Presumption — Indorsement on note — statute of limitations.*] The defendant claimed that the action was barred by the statute of limitations. The note was dated March 1, 1864, payable one year after date. Upon the back of the note were indorsements of interest in the handwriting of the testatrix, dated in 1865, 1866, 1867, 1868 and 1869, and May 9, 1870. The action was commenced April 12, 1876.

*Held*, as the indorsements purported to have been made by the testatrix before the note was outlawed, they were admissible in evidence against the defendant, without proof of actual payment.

Whether or not such payments were actually made was a question for the jury. RISLEY *v.* WIGHTMAN..... 163

13. — *Impeaching character of witness — rebutting testimony — what admissible as.*] Upon the trial of an action for assault and battery, the defendant having called several witnesses who testified to the bad character of the plaintiff, a milliner, who had testified in her own behalf, she was recalled and asked: "How was it as to the better class of ladies in the village patronizing you up to that time?"

*Held*, that the question was improper, and that the court erred in allowing it to be put and answered against the objection and exception of defendant's counsel. HAGADORN *v.* KEARNEY..... 236

14. — *Witness — Contradiction of — when allowed.*] A witness may be contradicted not only as to his testimony in chief, but also as to matters drawn out on his cross-examination, material to the issue, especially when the contradictory statements tend to discredit, vary, modify or explain the testimony given by him on his direct-examination.

GREENFIELD *v.* PEOPLE..... 242

15. — *Challenges — review of decision as to.*] In reviewing the decision of a trial court upon a challenge to the favor, the appellate court has the power, and it is its duty, to pass upon the facts *de novo*, from the evidence adduced before the court below. *Id.*

16. — *Evidence upon.*] Since the passage of the act of 1873, by which challenges both for principal cause and for favor are to be tried by the court, it is not necessary to reiterate, upon the challenge for favor, the evi-



**EVIDENCE — Continued.**

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dence taken upon a challenge for principal cause on the same ground; but the court is to decide upon the testimony given on both challenges. *Id.*

17. — *Impression as to guilt — when it does not render a juror incompetent.*] Where, upon a challenge for favor, it appeared that the person challenged had a preconceived impression as to the guilt of the accused, based upon statements which he had read in an account of a former trial, which statements might or might not be supported by the evidence, but he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression, *held*, that the challenge was properly overruled. *Id.*

18. — *Impeachment of witness — when prior declaration of witness may be proved, for the purpose of sustaining his testimony.*] In this action, brought for a partnership accounting, the defendant claimed that the accounts had been settled by an accord and satisfaction. The parties themselves were the principal witnesses and gave contradictory evidence. The defendant to impeach plaintiff's testimony denying the settlement, gave evidence to show that at the time of the settlement, plaintiff thought that defendant's father, a man of wealth, intended to leave his property to defendant in trust and not absolutely; and that subsequently, upon learning that the property was left to defendant absolutely, so that defendant was peculiarly responsible, he denied the settlement. Upon the trial the plaintiff offered to prove by a witness that he had denied that any settlement had been made before he knew the contents of the will of defendant's father.

*Held*, that the evidence was proper as tending to show that the plaintiff had denied the settlement, at a time when he could not have been impelled so to do by a knowledge of the change in defendant's pecuniary condition.

HERRICK v. SMITH..... 446

19. — *Discrediting witness — prior confirmatory statements.*] Where an attempt is made to discredit a witness on the ground that when his testimony is given his interests prompt him to make a false statement, he may show that he made similar statements at a time when he had no advantage to derive from so doing. *Id.*

20. — *Conspiracy — statements of one conspirator — when admissible against his coconspirator.*] Upon the trial of an indictment against several persons for a conspiracy to cheat and defraud, depositions of one conspirator, taken upon his examination before a justice of the peace after his arrest for the alleged conspiracy, and several months after the accused had ceased to act together in furtherance of the conspiracy, are inadmissible as evidence against a coconspirator. *STONE v. PEOPLE*..... 263

21. — *Burden of proof — local assessment.*] Where only that portion of an assessment in the city of Brooklyn which is in excess of the fair value of the actual local improvement is subject to review by petition, it rests upon the petitioner to allege and prove the existence and amount of such excess.

MATTER OF MEAD..... 349

22. — *Obtaining money by false pretenses — admissions of plaintiff in error — what cannot be proved by.*] Upon the trial of the plaintiff in error for obtaining money by false pretenses the prosecution, in order to prove the existence of a mortgage upon the prisoner's house, produced a certificate of the clerk of Jefferson county tending to show the existence of a mortgage on defendant's house and lot in Watertown, which was rejected because it did not contain a copy of the whole mortgage. The district attorney was then sworn and testified, under objection, that in a certain conversation the defendant said to him that he owned a house and lot in Watertown worth \$40,000, which was incumbered by a mortgage of \$20,000 given to trustees to secure bonds negotiated by them.

*Held*, that as the prosecution had not accounted for the non-production of the mortgage itself, the record, or a copy thereof, the admission by the prisoner was not admissible to prove the existence or terms of the mortgage.

SHERMAN v. PEOPLE..... 576

*Semble*, that the admissions of a party are competent evidence, only when parol evidence of the facts sought to be shown by such admissions would be competent. *Id.*

**EVIDENCE — Continued.**

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*Semble*, that admissions are never admissible to establish the legal effect of documents. *Id.*

23. — *Declarations of (insured) assignor of life policy — not admissible against assignee.*] *Semble*, that in an action by the assignee of a policy of insurance, issued upon the life of his assignor, to recover the amount thereof, declarations made by the assignor are not admissible in evidence against the plaintiff, whether made before or after the issuing of the policy.

In no event can declarations made after the issuing of the policy be admitted. *EDINGTON v. AETNA LIFE INS. CO.*..... 543

— *Parol evidence is admissible to show that a mortgage was given to secure advances to be made by a party not named in the mortgage.*

*See HALL v. CROUSE* ..... 557

— *False imprisonment — confining persons supposed to have small-pox — delivery of, to hospital ambulance — injury subsequently received in ambulance and hospital — evidence of, not admissible on question of damages in action for the prior confinement.*

*See RIDER v. FULLER* ..... 609

— *Presumption — of assets — applicable to the judgment appealed from — arising from failure of executor to apply for limitation of amount of security on, under Code, § 339.*

*See YATES v. BURCH* ..... 622

— *Conversion of property — what evidence sufficient to establish — order of arrest for.*

*See WOODBRIDGE v. NELSON* ..... 890

— *Intent — false representations — when questions as to, material.*

*See HARDT v. SCHULTING* ..... 587

— *Section 399 of Code — “assignee” — meaning of, in — what witnesses excluded under that section, competent under § 829 of the Code of Civil Procedure.*

*See RICHARDSON v. WARNER* ..... 13

— *Presumption — letters patent are presumed to have been regularly issued.*

*See PEOPLE v. STEPHENS* ..... 17

— *Summary proceedings — defense by tenant, that the lease was in fact a mortgage — that it was void for usury — how proved.*

*See PEOPLE EX REL. AINSLEE v. HOWLETT* ..... 138

— *Newly discovered — new trial on the ground of, should only be granted upon condition that the party applying therefor shall pay the costs of the former trial.*

*See COMSTOCK v. DYE* ..... 113

— *Note given upon signing of contract for sale of land — plaintiff in an action thereon must prove performance of the contract.*

*See HOAG v. PARR* ..... 95

— *Mutual account — what proof of, required in order to avoid the statute of limitations.*

*See CUCK v. QUACKENBUSH* ..... 107

— *Fire started by sparks from engine — identification of engine.*

*See BEVIER v. DELAWARE AND HUDSON CANAL CO.* ..... 254

— *Malice — inference as to, in an action for malicious prosecution.*

*See JENNINGS v. DAVIDSON* ..... 393

**EXCESSIVE DAMAGES** — *Setting aside of verdict because of.*] An action was brought to recover damages for injuries sustained by the plaintiff while crossing one of defendant's (a railroad company's) tracks, and alleged to have been caused by its defective condition. Upon the trial it appeared that, prior to the accident, plaintiff had worked on a farm and could do any work connected therewith; that by the accident his right leg was broken near the hip; that he was confined to his bed from the time of the accident in July to October first; was placed in a special bed and his leg kept extended by proper appliances for eight weeks; that his right leg was one inch and a-half shorter than the other; that he could go over even ground with one crutch; and had

**EXCESSIVE DAMAGES** — *Continued.*

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mowed on a mowing-machine, raked with a horse-rake, and driven his team on the road somewhat, but was not able to do much farm work; that the injury was permanent and he could never recover therefrom. The jury rendered a verdict in his favor for \$14,000. *Held*, that the verdict would not be set aside as excessive. *GALE v. N. Y. CENTRAL AND H. R. R. Co.* 1

**EXCURSION TICKET** — *Issued by railroad company — a continuous passage only can be demanded thereunder and the holder has no right to stop over at intermediate stations.*

See *TERRY v. FLUSHING, N. S. AND C. R. R. Co.*..... 859

**EXECUTION** — *Neglect of sheriff to enforce, in replevin suit.*

See *HOFFMAN v. CONNER* ..... 541

— *Levy under by sheriff — when sufficient to sustain replevin or action for conversion.*

See *ALVORD v. HAYNES*..... 26

**EXECUTORS AND ADMINISTRATOR** — *Surrogate — jurisdiction of, over disputed claims.] 1. A surrogate has no jurisdiction upon a final accounting to hear and determine the validity of a disputed claim against the estate of a deceased person.*

Where, upon a final accounting, the executrix presents an account in which is contained an item for money paid by her to a creditor, in settlement of a claim against the estate, which item is objected to and attacked by her co-executor and by the other persons interested in the estate, the surrogate has no jurisdiction to determine as to the validity of the same, or to refer the same to an auditor. *BOUGHTON v. FLINT*..... 206

2. — *Appeal by — security on — failure to apply for limitation of amount, under Code, § 339 — presumption of assets, arising from.] Although section 339 of the old Code authorized the court to dispense with or limit the security, required by sections 335, 336, 337 and 338 to be given upon an appeal, when the appellant was an executor, administrator or trustee acting in the right of another, yet when an executor without making any application to have the security limited or dispensed with gives the security in the ordinary form, the giving of such undertaking will be taken as an admission by him that he has sufficient assets applicable to the payment of the judgment appealed from, to satisfy the same. *YATES v. BURCH* ..... 622*

— *Appointed in this State — may sue in courts of this State to recover for negligent killing of their testator or intestate in New Jersey, and recover under statute of that State.*

See *STALLKNECHT v. PENNSYLVANIA R. R. Co.*..... 451

**EXEMPLARY DAMAGES** — *When not allowable]* The plaintiff, in pursuance of a contract made with the defendant, claimed to be entitled, by virtue of a commutation ticket, to ride to East New York. Having exercised this right for some time, the defendant refused to carry him to that point unless he would pay extra fare from Jamaica to East New York; and upon his refusal so to do, in obedience to an order of the defendant, the conductor ejected him from the train, using, in so doing, no unnecessary violence. Upon the trial of this action, brought to recover damages for so doing, the court charged that the evidence was not sufficient to give punitive damages against the conductor, but that plaintiff was entitled to have the railroad company punished to such an extent as the jury should, in their discretion, say the facts authorized and demanded. *Held*, that the charge was erroneous. *PARKER v. LONG ISLAND R. R. Co.*..... 819

**FALSE IMPRISONMENT** — *False imprisonment — confining person supposed to have small-pox — delivery of, to hospital ambulance — injury subsequently received in ambulance and hospital — evidence of, not admissible on question of damages in action for the prior confinement.*

See *RIDER v. FULLER*..... 669

**FALSE PRETENSES**—*Obtaining money by—admissions of plaintiff in error—what cannot be proved by.*] Upon the trial of the plaintiff in error for obtaining money by false pretenses the prosecution, in order to prove the existence of a mortgage upon the prisoner's house, produced a certificate of the clerk of Jefferson county tending to show the existence of a mortgage on defendant's house and lot in Watertown, which was rejected because it did not contain a copy of the whole mortgage. The district attorney was then sworn and testified, under objection, that in a certain conversation the defendant said to him that he owned a house and lot in Watertown worth \$40,000, which was incumbered by a mortgage of \$20,000 given to trustees to secure bonds negotiated by them.

*Held*, that as the prosecution had not accounted for the non-production of the mortgage itself, the record, or a copy thereof, the admission by the prisoner, was not admissible to prove the existence or terms of the mortgage.

**SHERMAN v. PEOPLE**..... 576

*Semble*, that the admissions of a party are competent evidence, only when parol evidence of the facts sought to be shown by such admissions would be competent. *Id.*

*Semble*, that admissions are never admissible to establish the legal effect of documents. *Id.*

— *Indictment for obtaining money on—what must be alleged in.*

*See* **PEOPLE EX REL. PHELPS v. GENERAL SESSIONS**.... 396

**FALSE REPRESENTATIONS**—*Intent—when questions as to, material.*

*See* **HARDT v. SCHULTING** ..... 537

**FAMILY**—*Father and daughter—mutual account between—how proved so as to avoid the statute of limitations.*

*See* **CUCK v. QUACKENBUSH**..... 107

**FEDERAL COURT**—*Removal of action to.*] To authorize the removal of an action from a State to a Federal court it is not sufficient that it is alleged that the defendant was an alien, a citizen or subject of a foreign State or country at the time the petition for such removal was prepared, but it must appear that such was the fact at the time of the commencement of the action.

**TUGMAN v. NATIONAL STEAMSHIP CO.**..... 333

**FEEES**—*Paid to a stenographer, and for preparation of maps, cannot be taxed as disbursements.*

*See* **PROVOST v. FARRELL**..... 308

**FINDINGS**—*Motion to send back a case to a referee for further findings—when denied.*] Upon a motion for an order to send back a case to a referee for further findings, it appeared that he had already passed upon such questions by refusing to find as requested, and that in each case the party requesting the finding had duly excepted to his refusal so to find.

*Held*, that the motion was properly denied, as upon such a motion the Special Term was not authorized to look into the whole case and determine that the referee ought to decide questions presented to him differently from what he had already done. **PEOPLE v. BANK OF NORTH AMERICA**..... 434

**FIRE**—*Started by sparks from engine—identification of engine—duty of railroad as to condition of engine—negligence on the part of the plaintiff—duty of, as to putting out fire.*

*See* **BEVIER v. DELAWARE AND HUDSON CANAL CO.**..... 254

**FIRE DEPARTMENT**—*Of Rochester—power of city over—liability of city for negligence of a member of.*

*See* **SMITH v. CITY OF ROCHESTER**..... 214

**FIRM**—*Marshalling of assets of—bond signed by partners individually—when it constitutes a firm obligation—remedy against the individuals and also against the receiver of the firm.*

*See* **BERKSHIRE WOOLEN CO. v. JUILLARD** ..... 507

**FIXTURES** — *When property put on land under parol agreement does not become.*] A parol contract having the effect of giving an easement in land, though void under the statute of frauds, may inure as a license to protect a party acting thereunder from being a trespasser and the property placed by him on the land from being deemed fixtures. *CAYUGA RAILWAY v. NILES.* 170

**FOREIGN STATUTE:**

*See* STATUTE.

**FORGERY** — *Of negotiable paper — when person signing it is estopped from denying its genuineness.*] In 1874 a promissory note made by one George W. Carpenter, a son of the defendant, and indorsed by the latter, was transferred to one McKee, who stated to the defendant that he had transferred it to one Hamlin, and that Hamlin said he wished defendant had signed it on its face. Subsequently Hamlin saw the defendant, and the latter having agreed to sign the note on the face, Hamlin produced the note, now in suit, and defendant signed it as surety. Subsequently the note was transferred to other persons and purchased by the plaintiff before maturity, and in good faith. Upon the trial of this action, brought upon the note, it appeared that the note signed by defendant was not the note originally signed by him, but was a copy thereof, upon which the signatures and indorsements had been forged by McKee. Defendant interposed this as a defense, alleging that at the time of signing his name at Hamlin's request, he made no examination of the note, because the face looked just like the one he had signed, and he supposed it was the same.

*Held*, that the defendant having had full opportunity to examine the note as to its character and genuineness, and having failed so to do, preferring to rely upon the statements of McKee and Hamlin, he could not interpose such a defense in an action by one who purchased the same in good faith before maturity. *MOSEY v. CARPENTER* ..... 603

**FRAUD** — *Divorce — decree, when void because fraudulently obtained.*] 1. In proceedings instituted against the relator, before a police justice in the city of New York, for abandoning his wife and children, the defense was an absolute divorce procured by him in Utah. The decree, which was granted November 3, 1876, showed that the relator appeared by counsel; that the wife did not appear in person or by counsel, but had been served by publication; that a decree was taken by default on the ground "that the said parties could not live in peace and union together and their welfare requires a separation, and that the plaintiff wishes to become a resident of Beaver county, in the territory of Utah."

The wife testified that her husband left his family in Brooklyn, in September, 1876, telling her that he was going to Cincinnati to open a sewing machine agency; that she was never in Utah and never knew of the suit until a copy of the decree was served upon her in December, 1876. *Held*, that the decree was fraudulently obtained and was an absolute nullity.

*PEOPLE EX REL. COMMISSIONERS v. SMITH.* ..... 414

2. — *Indictment for obtaining money by false pretenses — what must be alleged in.*] An indictment alleging that the defendant, with intent feloniously to cheat and defraud the city of New York, and to get into his possession a certain sum of money belonging to said city, knowingly made certain false and fraudulent representations to an officer thereof whereby the latter was induced to pay the said money to a third person, but which does not allege that the defendant received the money or any portion thereof, either alone or in conjunction with others, is bad and should be quashed.

*Quære*, whether, if the indictment charged that the person who made the false pretenses obtained the money, it would be sufficient upon the trial to show that some other person actually received it.

*PEOPLE EX REL. PHELPS v. GENERAL SESSIONS.* ..... 396

3. — *On proof of loss under policy of insurance.*] A policy provided that all fraud or attempt at fraud, by false swearing or otherwise, should cause a forfeiture of all claim on the company.

*Held*, that it was not enough to constitute a breach of this condition;

**FRAUD — Continued.**

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that the insured in making out proof of loss, had overvalued an article destroyed by the fire, even though it appeared that she knew or ought to have known that the valuation was excessive, unless such overvaluation was made with a fraudulent intent. *GIBBS v. CONTINENTAL INS. CO.*..... 611

— *Action to set aside contract because of — offer to restore what was received under the contract — when necessary to be made in the complaint.*

*See HOY v. HOY.*..... 815

**FRAUDULENT CONVEYANCE** — *What must be done by creditor before he can attack it — Non-resident debtor.*] Where an action is brought against a debtor of the plaintiff and one to whom such debtor has fraudulently conveyed certain real estate, while so indebted, to set aside such conveyance and to satisfy plaintiff's claim from the proceeds arising upon the sale thereof, it must be alleged in the complaint and proved upon the trial, that plaintiff has recovered a judgment against the debtor and has exhausted all available legal remedies against him.

It is not sufficient to show that the debtor is a non-resident of this State and has no property herein, so long as it appears that he is living in another State, and may be proceeded against by the ordinary forms of law existing therein. *BALLOU v. JONES.*..... 629

**FRAUDULENT REPRESENTATIONS** — *An action lies to annul bond and mortgage procured by.*] 1. The complaint in an action alleged that the plaintiff was induced, by the fraudulent representations of the defendant, to purchase from him a farm for \$18,000, which, if his representations had been true, would have been worth \$20,000, but it was, in fact, worth not over \$12,000; that he paid \$5,000 in cash, assumed a mortgage for \$2,000, and gave a bond and mortgage back for \$11,000, payable in \$1,000 annual installments, one of which he had paid, and prayed that the bond and mortgage might be canceled, and for damages. At the Circuit the complaint was dismissed, on the ground that no damages had as yet been sustained, and that the facts alleged would prove a defense to an action brought to foreclose the \$11,000 mortgage.

*Held*, that the court erred in dismissing the complaint; that, upon the facts alleged therein, the plaintiff was entitled to maintain an action in equity to have the bond and mortgage canceled and delivered up to him.

*RANNEY v. WARREN.*..... 11

2. — *Sale of bonds procured by — measure of damages.*] The defendants having, by false and fraudulent representations, induced the plaintiff to purchase certain railroad bonds, he, upon discovering the fraud some three years after the purchase, brought this action to recover the damages occasioned thereby. The defendants were acting as brokers, for both the purchasers and the sellers. Upon the trial the court charged, as to the measure of damages, that the plaintiff was entitled to recover the actual damages which resulted from defendants' conduct up to the time when he first discovered the fraud — the difference between the sum paid and the value of the stock — that is, the difference between the price paid and the actual value of the bonds at the time when the plaintiff discovered the fraud.

*Held*, that the charge was incorrect; that the measure of damages was the difference between the actual value of the bonds at the time of the sale and their value as they were represented to be. *WYETH v. MORRIS.*..... 388

3. — *Money obtained by — recovery of — measure of damages.*] Upon the representation of the defendant that he was the owner of a bond and mortgage given by the plaintiff, and which was then overdue, the latter agreed to and did pay to the former \$120 upon his agreeing to carry the bond and mortgage for a year. Defendant did not own the mortgage, but by paying the owner of it \$100 induced him to carry it for a year. Upon the foreclosure of the mortgage this \$100 was allowed as a payment upon it.

In this action, brought by the plaintiff to recover damages occasioned by the fraudulent representation of the defendant, *held*, that plaintiff was entitled to recover the twenty dollars, not applied upon the mortgage, with interest. *SAUNDERS v. CHAMBERLAIN.*..... 568

**FRIVOLOUS ANSWER.**—*Extending time to pay debt.*] In an action to recover for liquors sold to the defendant, the defendant set up that the plaintiff had accepted the defendant's promissory note for the amount due, whereby the time for the payment of the debt was extended, and that such note was not yet due.

*Held*, that as the answer did not allege that the note so accepted was a negotiable note, it was properly overruled as frivolous. **WEBSTER v. BAINBRIDGE**, 180

**GENERAL SESSIONS**—*Court of—absence of two justices—power of county judge to receive a verdict.*] The plaintiff in error was tried at a Court of General Sessions for grand larceny. After the jury had retired to consider their verdict both of the justices sitting with the county judge left the court room, and one of them left the building. While they were absent the jury came in and the county judge received their verdict of guilty. The jury were polled at the request of the prisoner's counsel, without any objection on his part to the reception of the verdict in the absence of the two justices.

*Held*, that the county judge had no power to receive the verdict, and that the conviction or sentence must be set aside. **HINMAN v. PEOPLE**..... 266

**HIGHWAYS**—*Commissioners of—duties of, as to bridges—negligence.*] 1. The defendants, commissioners of highways, were notified, in June, 1875, that a bridge was defective, no particular defect being pointed out. Within a week, they, in company with an experienced bridge builder, examined the bridge carefully, from above and below, taking off the planks and testing the timber, but could discover no defect. Shortly after, they caused another experienced bridge builder to examine it, and replace old planks by new, where necessary. In the following month the bridge fell and injured the plaintiff. The accident was caused by one of the timbers being rotten at the center, which defect could only be discovered by cutting the timber in two.

*Held*, that the defendants were guilty of no negligence, and that the plaintiff was not entitled to recover. **HICKS v. CHAFFEE**..... 294

2. — *Liability of municipal corporation for accident caused by obstruction in—for injury occasioned by accident.*] The defendant placed on the west side of Mohawk street, in the city of Cohoes, a hydrant, projecting several inches beyond the curb, with an iron nozzle on the side nearest the street, which projected several inches over the road-bed, at the height of about two feet. On the opposite side of the street the defendant had negligently allowed to accumulate a pile of ashes twenty feet long, ten feet wide and three feet high, the space between the pile and the west curb being about twenty feet.

Plaintiff's horse, which he was driving before a sleigh, took fright and ran along the street in the direction of the hydrant; plaintiff was unable to guide or direct him with precision; at that time a wagon was passing the hydrant in an opposite direction, leaving a space of about twelve feet between it and the hydrant; plaintiff's horse, in passing through this space, struck the hydrant or its nozzle, with the cross-bar of the sleigh, whereby the plaintiff was thrown therefrom and injured. Plaintiff used his best endeavors to guide and control his horse, which was blind, and was guilty of no negligence which contributed to the accident.

This action was brought to recover damages for the injuries sustained. *Held*, that the facts of the case justified a finding by the referee that the defendant was negligent in allowing the pile of ashes to accumulate and remain in the street, and in erecting and maintaining the hydrant so that it and its nozzle projected into the street, and that the plaintiff was entitled to recover. **RING v. CITY OF COHOES**..... 77

3. — *Blind horse.*] That the fact that the plaintiff's horse was blind and that the accident occurred while it was running away, did not relieve the defendant from the liability imposed by its negligence, so long as it appeared that the plaintiff was blameless and free from any negligence contributing to the accident. *Id.*

4. — *Duty of municipal corporations as to streets.*] In making improvements in the public streets, and in keeping them in repair, the officers of the municipality are bound to act with due regard to the safety of travelers;

**HIGHWAYS**—*Continued.*

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and for any neglect or omission of duty in that regard, an action will lie by any person specially injured thereby. *Id.*

5. — *Liable for combined result of negligence and accident.*] It is the duty of a municipality, bound to construct and maintain highways, to provide for the reasonable safety of travelers in reference to such accidents as may be expected to happen therein; and when a traveler is not in fault, but an injury happens to him, which is the combined result of accident, and of negligence attributable to the municipality because of its omission to keep the road in repair, the latter will be held liable for the damages occasioned thereby. *Id.*

— *Commissioners of* — *power of, to enjoin purpresture.*

See COYKENDALL v. DURKEE..... 260

— *Complaint alleging obstruction of* — *public nuisance* — *when an action to abate maintainable.*

See VAN BRUNT v. AHEARN..... 388

— *Purpresture* — *order laying out highway* — *record of, how impeached* — *the survey* — *must be incorporated into the order.*

See PRATT v. PEOPLE..... 664

**HUSBAND AND WIFE**—*Abandonment of husband by wife* — *right of wife to compel a provision for her maintenance.*] 1. In this action, brought by the plaintiff against her husband, she alleged that shortly after her marriage she had conveyed to him the greater part of all her property, both real and personal; that the defendant had taken possession of the same and spent large sums in gambling and riotous living; that the plaintiff was now living apart from her husband with her mother and had no means of support, and she prayed that a portion of the real estate held by her husband might be conveyed to her for her support and maintenance.

Upon an application for an injunction restraining the defendant from collecting the rents of the real estate or selling or disposing of the same, *pendente lite*, held, that, as the wife had voluntarily separated from her husband and did not charge him with adultery or any act of cruelty or desertion which would entitle her to a limited divorce, the motion was properly denied.

NOE v. NOE..... 436

— *Chap. 277 of 1840.*] *Policy upon life of husband for benefit of wife* — *not assignable by her* — *Chap. 277 of 1840.*] A life insurance company issued a policy of insurance upon the life of plaintiff's husband, payable at his death to her, her executors, administrators or assigns, the policy reciting the payment of the first premium therein by her. In fact, the policy was issued upon the application of the husband and the first, and all subsequent premiums were paid by him. Held, that the policy was designed as a provision for the support of the wife during widowhood, and was within the equity of the statute in regard to insurances effected by husbands for the benefit of their wives and children (chap. 277 of 1840, and the acts amendatory thereof); and that an assignment thereof, made prior to the passage of chapter 21 of 1873, was void and incapable of enforcement. WILSON v. LAWRENCE..... 238

3. — *Enticing wife from husband* — *right of action for* — *good faith of person receiving* — *when a defense.*] Upon the trial of an action brought by a husband against his wife's father to recover damages for enticing away his wife, evidence was given tending to show that the wife, by reason of illness, was unable to leave her husband's house without assistance, and that her father, at her request, removed her to his own. The justice charged that, even if the husband's treatment of his wife was not improper, in fact, yet if such complaints were made to the defendant by the wife and others, as induced him to believe that she was cruelly treated by her husband, and he acted in good faith in taking her to his house, the plaintiff could not recover. Held, that the charge was correct. SMITH v. LYKE..... 204

— *Assent of husband to conveyance by married woman under chap. 90 of 1860* — *effect of failure of.*

See WING v. SCHRAMM..... 377



**HUSBAND AND WIFE**— *Continued.*

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— *Liability of married woman on her note — when her husband has entire control of her business.*

See **SMITH v. KENNEDY**..... 9

— *Services rendered by married woman — husband must bring the action to recover for.*

See **CUCK v. QUACKENBUSH**..... 107

**IMPEACHMENT** — *Of witness — when prior declarations of witness may be proved, for the purpose of sustaining his testimony.*

See **HERRICK v. SMITH**..... 446

**INDICTMENT** — *Assault with intent to commit a rape — 3 Rev. Stat. (6th ed.), 938 § 49.]* 1. In an indictment under the statute providing that every person who shall be convicted of an assault with the intent to commit robbery, burglary, *rape*, manslaughter, etc., shall be punished "as therein provided, it is sufficient to allege that an assault was made upon a female child," "with intent then and there, willfully and feloniously, to commit a rape against the form of the statute," etc., and it is not necessary to allege that the intent was to "carnally and unlawfully know" the said child.

**SINGER v. PEOPLE**..... 418

2. — *Consent of child under ten years of age.]* Where an assault with intent to commit rape is made upon a female child under the age of ten years, the fact that she assented thereto does not alter the nature of the crime or diminish the guilt of the accused. *Id.*

3. — *For obtaining money by false pretenses — what must be alleged in.]* An indictment alleging that the defendant, with intent feloniously to cheat and defraud the city of New York, and to get into his possession a certain sum of money belonging to said city, knowingly made certain false and fraudulent representations to an officer thereof whereby the latter was induced to pay the said money to a third person, but which does not allege that the defendant received the money or any portion thereof, either alone or in conjunction with others, is bad and should be quashed.

*Quere*, whether, if the indictment charged that the person who made the false pretenses obtained the money, it would be sufficient upon the trial to show that some other person actually received it.

**PEOPLE EX REL. PHELPS v. GENERAL SESSIONS**..... 396

4. — *Misjoinder of counts.]* Where it is claimed that there is a misjoinder of counts in an indictment because the first count charges a misdemeanor only, and the second count a felony, the proper remedy is to put the district attorney to his election, or to ask the court to give proper instructions to the jury as to their verdict; such misjoinder does not entitle the defendant to have the indictment quashed, except in the discretion of the court. *Id.*

**INFANT** — *Sale of real estate of — mortgage given by purchaser — want of title in infant — no defense to.]* In proceedings instituted for the sale of the real estate of an infant, it was alleged that his father, through whom, by descent, the infant acquired title to the property sold, was dead. A conveyance of the property was duly made in such proceedings to one Jacobson, who gave back a bond and mortgage to secure a portion of the purchase-money. This action was brought against the person to whom Jacobson had conveyed the premises, subject to the mortgage, and who had assumed the payment thereof, to foreclose the same. The defendant set up as a defense that the father was still living.

*Held*, that, as the answer failed to set up any eviction or disturbance of defendant's possession, the answer was properly stricken out as frivolous.

**PARKINSON v. JACOBSON**..... 317

**INFERENCE** — *As to malice — in an action for malicious prosecution.*

See **JENNINGS v. DAVIDSON**..... 393

**INJUNCTION** — *Temporary — when refused.]* Some seventeen years since, the plaintiff, by a contract, became possessed of the rights and interests of the Albany and Vermont Railroad Company in its road-bed, which ran gen-

**INJUNCTION — Continued.**

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erally in the same direction, but at places two or three miles distant from plaintiff's road. At that time the plaintiff took up the tracks from a considerable portion of this route and ceased to use it, the road-bed being in most cases enclosed and used by the adjoining owners. Recently the defendant having acquired the rights and titles of some of the adjacent owners in and to the said road, entered upon the same and commenced to grade and lay tracks thereon, intending to operate the road when completed.

This action was brought by the plaintiff to restrain the defendant from so doing.

*Held*, that it was not a proper case in which to grant a temporary injunction. *TROY AND BOSTON R. R. CO. v. BOSTON, HOOSAC TUN. AND W. R. R. CO.*, 60

— *Temporary — when granted to restrain trespasses.*

*See JOHNSON v. CITY OF ROCHESTER* ..... 285

**INSOLVENT DEBTOR — Trustees of — reference of claims by — procedure on application for —** 3 R. S. (6th ed.), 39, §§ 21, 22.

*See WICKHAM v. FRAZEE* ..... 431

**INSURANCE — Policy of — “unoccupied” — meaning of.]** 1. A policy of insurance issued upon a dwelling-house provided that if it should cease to be occupied by the owner or occupant in the usual and ordinary manner in which dwelling-houses are occupied as such, the policy should become void. The house was occupied by a tenant, who, on March fifteenth, commenced to move out, and removed most of his furniture and all of his family from the house. No person was left in it, and on the night of the sixteenth it was destroyed by fire.

*Held*, that the question whether or not the house was unoccupied at the time of the fire, within the meaning of that term as used in the policy, was properly left to the jury. *WAIT v. AGRICULTURAL INS. CO.* ..... 371

2. — *Policy of — reformation of.]* The plaintiff, in June, 1867, held a mortgage for \$2,500 containing the usual insurance clause. On June twenty-eighth the defendants issued to the plaintiff a policy for \$2,500 insuring her as mortgagee. In June, 1868, plaintiff took another mortgage for \$500 on the same property also containing the insurance clause. Plaintiff applied for a new policy to cover both amounts. The policy was not delivered at the time of making the application, but was subsequently received by the plaintiff and accepted without examination. This new policy contained an additional clause, providing that the company should only be liable for any deficiency that might remain after the plaintiff had exhausted the primary security. The second policy was renewed from time to time until October, 1878, when the property was destroyed by fire, and plaintiff then, for the first time, discovered that the additional clause had been inserted.

In an action by the plaintiff to reform the policy by striking out this clause, *held*, that the insertion of this clause by the defendant without notice to the plaintiff was, in legal contemplation, a fraud, and that the same should be stricken therefrom. *HAY v. STAR FIRE INS. CO.* ..... 496

3. — *Limitation of time to bring action upon policy — when the time commences to run in such case.]* The policy provided that no suit or action for the recovery of any claim by virtue of the policy should be sustainable in any court, unless it was brought within twelve months after the loss had occurred.

*Held*, that the clause in the policy as written, requiring the primary security to be first exhausted, was inconsistent with such a provision and that it did not, therefore, apply to the case of insurance of the interest of a mortgagee; that under the contract, as it was claimed to be by plaintiff, the cause of action did not accrue until the entry of the judgment reforming the policy. *Id.*

4. — *Policy upon life of husband for benefit of wife — not assignable by her — Chapter 277 of 1840.]* A life insurance company issued a policy of insurance upon the life of plaintiff's husband, payable at his death to her, her executors, administrators or assigns, the policy reciting the payment of the first premium therein by her. In fact, the policy was issued upon the application of the husband, and the first and all subsequent premiums were paid by him.

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*Held*, that the policy was designed as a provision for the support of the wife during widowhood, and was within the equity of the statute in regard to insurances effected by husbands for the benefit of their wives and children (chap 277 of 1840, and the acts amendatory thereof); and that an assignment thereof, made prior to the passage of chapter 21 of 1873, was void and incapable of enforcement. *WILSON v. LAWRENCE*..... 238

5. — *Policy of — condition of.*] The defendant issued to the plaintiff a policy of insurance upon a frame building owned by him, the policy providing that it should be void if any change or transfer in title or possession should take place without the consent of the company indorsed upon the policy, or if the interest of the assured, as owner, mortgagee, devisee, or otherwise, was not truly represented to the company and stated in the policy; it also provided that the use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and indorsed on it, should not be construed as a waiver of any printed or written conditions.

The plaintiff sold the house and took back a purchase-money mortgage. The defendant's agent thereafter received the annual premium from and gave a receipt therefor to him, being aware of these facts and understanding that he intended to insure his interest as mortgagee.

*Held*, that in an action on the policy the jury might infer an agreement by the agent to insure plaintiff's interest as mortgagee, and a waiver of the requirement that the plaintiff's interest, as mortgagee, should be indorsed on the policy. *WHITED v. GERMANIA FIRE INS. CO.*..... 191

6. — *Power of agent to waive.*] The agent was authorized to solicit insurance, issue and renew policies, note the changing of title, and to collect and pay premiums.

*Held*, that this evidence justified the conclusion that the agent had authority to waive, and by his acts had waived the condition above referred to, and that plaintiff was entitled to recover. (*Id.*)

7. — *On interest of purchaser of land — in possession and in default under a contract for the sale thereof.*] A policy of insurance issued to one in possession of land under a contract for the purchase thereof, is not rendered invalid by the fact that, at the time of issuing the policy, the assured has, by a failure to perform the contract on his part, rendered the same voidable at the election of the vendor, where such right has not been exercised, although the fact that he was in default was not stated to the company.

*PELTON v. WESTCHESTER FIRE INS. CO.*..... 23

8. — *Action upon a policy of insurance — declaration by doctor as to cause of death — admissibility of.*] This action was brought to recover upon a policy of insurance, issued by the defendant upon the life of the son of the plaintiff's assignor, for her benefit. In the application for insurance, signed by the son and plaintiff's assignor, in answer to a question as to the cause of his father's death, he stated "don't know." Upon the trial it was claimed by the defendant that the father died of consumption and that this fact was known to the plaintiff's assignor. Upon the examination of the plaintiff's assignor she was questioned as to the disease by which her husband died, and answered: "The doctors called it torpor of the liver and disease of the stomach and heart." It appeared that both of the physicians who had attended the husband were dead at the time of the trial. The defendant claimed that the evidence as to the statements of the doctors was inadmissible, as being mere hearsay.

*Held*, that the evidence was admissible as bearing upon the question of fact, whether or not the witness knew the disease with which her husband was afflicted and of which he died.

That the declaration was also admissible, as having been made by the doctors in the ordinary discharge of their professional duties.

*MCKNAIR v. NATIONAL LIFE INS. CO.*..... 144

9. — *Policy of — agreement to refer question of loss to arbitration — when not enforceable — waiver of.*] The defendant issued to the plaintiff a policy of insurance upon certain personal property, by which it agreed to make good unto the assured all such immediate loss or damage as should happen

**INSURANCE** — *Continued.*

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by fire to the property specified; *the amount of loss to be estimated according to the actual cash value of the property at the time of the loss.*

In the ninth condition of the policy it was provided that in case difference should arise touching any loss or damage, after proof had been received in due form, the matter should, *at the written request of either party*, be submitted to impartial arbitrators, whose award in writing should be binding on the parties as to the amount of such loss or damage, but should not decide the liability of the company under the policy.

In the tenth condition of the policy it was provided that no suit or action against the company, for the recovery of any claim by virtue of the policy, should be sustainable in any court of law or chancery, *until after an award shall have been obtained, fixing the amount of such claim in the manner above provided.*

In this action, brought to recover the amount due thereunder, upon the destruction of the property, the defendant claimed that a difference had arisen as to the value of the property destroyed, and that as no award had been made by arbitrators, no recovery could be had under the policy. Neither party had requested, either in writing or otherwise, that the matter should be submitted to arbitrators.

*Held*, that by the terms of the ninth condition, no obligation to submit the amount of the loss to arbitrators arose, until a *written request* so to do had been made by one of the parties. *GIBBS v. CONTINENTAL INS. CO.* ..... 611

10. — *Agreement to arbitrate—when only collateral.*] *Semble*, that the condition as to submitting the amount of the loss or damage to arbitrators was only collateral to the main agreement of the defendant, which was to pay the amount of the loss, "to be estimated according to the actual cash value of the property at the time of the loss," and that such collateral agreement did not deprive the plaintiff of the right to maintain an action on the policy until such reference and an award, in pursuance thereof, had been had. *Id.*

11. — *Waiver of right to claim arbitration.*] *Semble*, that as the defendant, by its answer, denied its liability for any part of the loss, on grounds specifically stated therein, it thereby waived the condition requiring an arbitration, as the amount of the loss was immaterial, if the company insisted that it was not liable for any portion thereof. *Id.*

12. — *When house unoccupied.*] The policy further provided that, "if the premises should become unoccupied without the consent of the company indorsed thereon, then and in every such case the policy should be void." The plaintiff had for some time before the fire, slept in the adjoining house, which belonged to her daughter, but had never abandoned the premises; her furniture and wearing apparel remaining there, and she returning and spending the day there.

*Held*, that the house was not unoccupied within the meaning of the condition. *Id.*

13. — *False valuation—must be fraudulent to avoid policy.*] Another condition of the policy provided that all fraud or attempt at fraud, by false swearing or otherwise, should cause a forfeiture of all claim on the company.

*Held*, that it was not enough to constitute a breach of this condition; that the insured in making out proof of loss, had overvalued an article destroyed by the fire, even though it appeared that she knew or ought to have known that the valuation was excessive, unless such overvaluation was made with a fraudulent intent. *Id.*

14. — *Public policy.*] The defendant issued a policy of insurance upon the life of one D., payable to the assured, his executors, administrators or assigns. D. transferred his interest in the policy to plaintiff for the sum of \$1,000, reserving the right to redeem, on repaying said sum with interest in one year, and during his life, but in case of his death before redeeming, the transfer to be absolute. In an action by plaintiff to recover the amount of the policy after D's death, it was claimed by the defendant that the agreement was against public policy, and fraudulent as to the heirs

**INSURANCE — Continued.**

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and next of kin of the assured, as it tended to deprive them of the right to redeem. *Held*, that the agreement was valid and should be sustained.

EDINGTON v. *ÆTNA LIFE INS. CO.* ..... 548

15. — *Assignment of — declarations of (insured) assignor not admissible against assignee.*] In an action by the assignee of a policy of insurance, issued upon the life of his assignor, to recover the amount thereof, declarations made by the assignor are not admissible in evidence against the plaintiff, whether made before or after the issuing of the policy.

In no event can declarations made after the issuing of the policy be admitted. *Id.*

16. — *Physicians cannot disclose facts acquired while attending patients.*] Upon the trial, Dr. E., who had testified that he had treated D. and prescribed for him in the spring and summer of 1862, was asked, "What did you do by way of treatment to him?" "Was he cured when he left your hands?" "Was he better or worse after you ceased treating him?" *Held*, that the court properly refused to allow the questions to be answered, as they were forbidden by the statute (2 R. S., 406, § 73) prohibiting a physician from disclosing information acquired by him in attending a patient professionally.

He was then asked whether, in May, 1867, in his opinion, "D. was in good health, and of sound body, and one who usually enjoyed good health?" *Held*, that the question was objectionable, as the opinion of the witness must necessarily be based, in part at least, on the information acquired by him in his professional attendance on D.

A physician was called who testified that he had examined D. for insurance in the Phoenix Life Insurance Company about the time of the second application in this case, and passed him as insurable. Upon cross-examination, he was asked if he would have recommended D. for insurance if the latter had informed witness that he had been treated by any of the five physicians who had attended him for a disease which he was unwilling to disclose, or that he had been under treatment for five years. *Held*, that the opinion of the witness as to what he would have done had those statements been made to him was of no importance, and was properly rejected. *Id.*

17. — *Waiver of this right — right of assignee so to do.*] The prohibition imposed by the statute upon a physician, preventing him from disclosing information acquired by him in attending upon a patient professionally, is for the benefit of the patient, and may be waived by him or by his assignee, nor is this privilege of the assignee affected by the death of his assignor. *Id.*

The question who is an attending physician under 2 Revised Statutes (406, § 73), discussed. *Id.*

18. — *Words — submission of meaning of to jury.*] To the question in the application, "Is the party subject to dyspepsia, dysentery or diarrhoea?" D. answered "No." Upon the trial the court charged the jury: "You will say what is the fair meaning of the words 'subject to.' Does it mean a single occurrence of a disease — a single attack — or does it mean that one has been habitually attacked, or that he is under the possession of the disease? \* \* \* Looking at this question, it is for you to say whether he was subject to dyspepsia, dysentery or diarrhoea." *Held*, that, as submitted, there was no error in allowing the jury to determine the meaning of the words "subject to." *Id.*

19. — *Application to company — what constitutes.*] To the question in the application "Has any application been made to this or any other company for assurance on the life of the party; if so, with what result?" D. answered, "Yes, and always successful." It appeared that, in 1862 or 1863, he handed to the agent of a foreign insurance company an application for insurance; that the agent said he did not think the company would take him; that, upon D.'s request, he handed the application to the examiner for the company, who was then D.'s physician; that the agent subsequently told D. that the examiner said he could not pass him, and that the examination was a farce and an unnecessary expense to put the company to; and there the matter dropped. The court left it for the jury to say whether or not D.'s answer was a truthful one. *Held*, that it did not appear that an application was made to the company; that the application was not even made to the

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agent to be forwarded to the company; that the application was never completed. *Id.*

20. — *Discrepancies in answer — when immaterial.*] One question was: "Has the party had, during the last seven years, any severe sickness or disease; if so, state the particulars and the names of the attending physicians, or who was consulted and prescribed?" The answer in the first application was: "Has had nervous difficulty and diarrhoea; C. H. Carpenter, Geneva, N. Y.;" in the second it was "No." The court left it to the jury to determine whether or not the nervous difficulty or diarrhoea was, in fact, a severe sickness or disease. *Held*, that this was proper; that if the nervousness and diarrhoea were not, in fact, severe diseases; the discrepancy between the two answers was not material. *Id.*

21. — *Contract for payment of agent of company — construction of.*] This action was brought by the plaintiff, an insurance agent, to recover the amount due upon a contract made with him by the defendant, which provided that his compensation was to be a commission upon premiums paid to the company on policies procured by him. The contract further provided that said defendant "agrees to advance to the party of the second part (plaintiff), each month, the sum of \$175, in addition to the foregoing commissions, such allowance to be charged against his commission account." It also provided that the plaintiff might, upon repaying the sums advanced under the contract, receive an additional commission on premiums.

*Held*, that the monthly advances were to be received by the plaintiff absolutely, in addition to his commissions, and that the same were not to be repaid by him, unless he should elect so to do in order to receive the higher commission. **HAHN v. NORTH AMERICAN LIFE INS. CO.** ..... 195

22. — *Receiver of insolvent company — not entitled to security deposited with superintendent of insurance department — chap. 463 of 1853.*] A receiver of an insolvent insurance company, appointed under chapter 463 of the Laws of 1853, is not entitled to have transferred to him the securities deposited by the company with the superintendent of the insurance department.

**MATTER OF GUARDIAN MUT. LIFE INS. CO.** ..... 115

— *Proof of loss — on one of several policies in the same company on the same property, payable to the same person — when sufficient for all — Insurance of party "as interest may appear" — effect of — Loss payable to A B — entitles A B to recover the entire amount, though in excess of his individual loss.*

*See DAKIN v. LIV. AND LONDON AND GLOBE INS. CO.* ..... 122

**INTENT** — *Evidence — False representations — when questions as to, material.*

*See HARDT v. SCHULTING.* ..... 587

**INTEREST** — *On legacy — when payable.*

*See WHEELER v. RUTHVEN.* ..... 530

**ISSUES** — *For trial — settlement of — discretionary with court — order directing is not appealable.*

*See SEYMOUR v. MCKINSTRY.* ..... 284

**JAIL** — *Violation of city ordinance — power to imprison in jail does not authorize imprisonment in penitentiary.*] By the charter of the city of Rochester the police justice thereof has jurisdiction in suits brought for a violation of any of the city ordinances, and is authorized to enter a judgment commanding a penalty, recovered for a violation of said ordinances, to be made of the goods and chattels of the defendant, if such can be found; and if not, then to commit the defendant to the county jail for such time as shall have been directed by the common council unless otherwise provided by the charter. The plaintiff having been adjudged guilty of a violation of one of the city ordinances, was sentenced to pay fifty dollars, or, in default thereof, to be imprisoned in the Monroe county penitentiary for ninety days.

*Held*, that the judgment was void (1) because it did not appear that the common council had made any direction as to the length of time for which persons found guilty of violating city ordinances should be imprisoned, and (2) because the charter authorized an imprisonment in the county jail only, and not in the county penitentiary. **MERKEE v. CITY OF ROCHESTER.** 157

**JOINDER** — *Of causes of action.*] A joinder in one complaint of a cause of action, arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and of a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper. *HAY v. HAY*..... 815

**JUDGE'S CHARGE** — *Enticing wife from husband.*] 1. Where, in an action for enticing a wife from her husband, the justice charged that, even if the husband's treatment of his wife was not improper, in fact, yet if such complaints were made to the defendant (her father) by the wife and others, as induced him to believe that she was cruelly treated by her husband, and he acted in good faith in taking her to his home, the plaintiff could not recover. *Held*, that the charge was correct. *SMITH v. LYKE*..... 204

2. — *Contributory negligence.*] Whether or not a plaintiff had been guilty of negligence contributing to an injury, is a question for the jury, and it is not the province of the court to instruct the jury that certain specified acts or omissions constitute negligence.

*BEYDER v. DELAWARE AND HUDSON CANAL CO.*..... 254

— *Submission of meaning of words in contract to jury — proper.*

*See EDINGTON v. AETNA LIFE INS. CO.*..... 543

**JUDGMENT** — *Based upon former judgment against defendant — reversal of such former judgment — effect thereof.*] In an action brought to recover damages for a breach of a covenant of seizin the plaintiff, to prove the breach, put in evidence a judgment recovered by one Smith against the defendant establishing a lien in favor of Smith upon the property and a *lis pendens* filed at the commencement of that action. After a recovery of judgment by the plaintiff the judgment recovered by Smith was reversed, upon appeal, by the General Term.

Upon an appeal by the defendant from the judgment recovered by the plaintiff, and from an order denying a motion for a new trial, *held*, that a new trial should be granted upon payment by the defendant of the costs of the first trial and of this appeal, and of ten dollars costs of opposing the motion below. *SMITH v. FRANKFIELD*..... 489

— *On insurance policy — loss payable to mortgagee — judgment must be in favor of mortgagee for entire amount though in excess of his individual loss.*

*See DAKIN v. LIV., LON. AND GLOBE INS. CO.*..... 123

**JURISDICTION** — *Of court of Special Sessions — Jury — trial in.*

*See PEOPLE EX REL. MURRAY v. SPECIAL SESSIONS.*..... 533

— *Special, of officer appointing a receiver — where allegations as to appointment of, necessary.*

*See MANLEY, RECEIVER, ETC., v. RASSIGA*..... 286

**JUROR** — *Misconduct of, waiver of.*] During a trial, the court having adjourned, one of the jurors, who lived twelve miles from the court-house, asked the plaintiff to let him ride home with him. The plaintiff assented and the juror rode with him about ten miles, in a three-seated sleigh, plaintiff and the driver on the front seat, two other persons on the middle seat and the juror and another person on the back seat. Nothing was said about the trial. Subsequently, and before the testimony had been closed, the defendant's counsel became acquainted with these facts, whereupon plaintiff's counsel offered to allow this juror to be excused, if defendant's counsel so desired. Defendant's counsel stated he was willing to leave it to the juror's sense of propriety whether he should or should not remain in the jury-box. *Held*, that even if the irregularity would, in any event, have justified the setting aside of the verdict, the acts and statements of the defendant's counsel constituted a waiver thereof. *GALE v. N. Y. CENTRAL AND H. R. R. CO.*, 1

— *When impressions as to the guilt of the accused do not render him incompetent — challenges — review of decision as to — evidence upon.*

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<b>JUSTICE'S RETURN</b> — <i>Appeal to County Court — return by justice — truthfulness of, cannot be questioned.</i> ] 1. Upon an appeal to the County Court from a judgment of a justice of the peace, the truthfulness of the justice's return, if it be fully responsive to the notice of appeal, cannot be questioned nor controverted by affidavits, nor can a further return, as to the truth of matters in respect to which the original return is controverted by affidavits, be required. BARBER v. STETTHEIMER .....	198
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<b>LANDLORD AND TENANT</b> — <i>Summary proceedings — what defense may be set up by tenant — That lease was in fact a mortgage — that it was void for usury — how proved.</i> ] In summary proceedings instituted to remove the relator from certain premises, on the ground that he was holding over after the expiration of his term, he made an affidavit stating that on the day on which the respondent alleged that the lease was made he executed and delivered to the respondent an absolute deed of the premises, and he and the respondent executed an agreement by which he agreed to buy the premises for a price thereip named, to be paid on the day the lease expired, and also executed the lease upon which the proceedings were instituted; that said instruments were all given at the same time to secure the repayment of a sum of money loaned to him by the respondent, and were in fact a mortgage; that upon the said loan usurious interest was reserved, the payment of which was secured by the said lease. <i>Held</i> , that it was competent for the relator to establish in such proceedings, that the instrument purporting to create the relation of landlord and tenant between himself and the respondent was in fact a mortgage to secure the repayment of a loan. That it was also competent to show that such instrument was given to secure a usurious loan, and was therefore void. That the establishment of either of these facts would require the proceedings to be decided in his favor. <i>Seemle</i> , that in summary proceedings it would not be competent to establish by parol evidence, that a deed absolute upon its face was intended as a mortgage. Where, however, the affidavit does not specify the kind of evidence by which it is expected to establish this fact, it must be presumed that it will be proved by competent evidence. PEOPLE EX REL. AINSLEE v. HOWLETT .....	138
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**LEASE :**

*See* LANDLORD AND TENANT.

**LEGACY** — *When payable — interest thereon.*] 1. Where a legacy is payable out of a particular fund which is not available for that purpose until a certain contingency happens, *e. g.*, the death of a tenant for life, such legacy will, in the absence of special circumstances, or of a provision of the will prescribing a different time of payment, be payable at, and will bear interest from the happening of the contingency, and not from the death of the testator. *WHEELER v. RUTHVEN*..... 580

— 2 *When they are charged upon land — liability of residuary legatees for payment of.*] A testator, by his will, bequeathed certain specific pecuniary legacies to persons therein named, and then proceeded, "after the payment of my funeral expenses, the payment of my just debts and the payment of the legacies aforesaid, I give, devise and bequeath unto my son, William Johnson, all the rest and residue of my estate, real and personal, wherever the same may be situated." *Held*, that the legacies were charged upon the real estate, and the residuary legatee, by taking possession thereof under and by virtue of the will, became personally liable for the payment of the legacies without any express promise by him. *STODDARD v. JOHNSON*..... 606

**LEGATEE** — *Application for a portion of a legacy for the support of* — 2 *R. S.*, 98, §§ 82, 83 — *what must be shown to authorize the order.*] 1. The respondent, a legatee for life in the rents, etc., of certain property devised by the will of appellant's testator, applied to the surrogate to be allowed to receive such part of the legacy as was necessary for her support, under the statute authorizing the surrogate to allow this to be done, upon it appearing to him that the assets in the hands of the executor exceed, by one-third, all debts, etc., then known, upon the execution of a satisfactory bond for the return of such portion, with interest, whenever required. A bond was tendered by the petitioners conditioned for the refunding of such moneys "as may be necessary to enable the executors to pay and discharge the debts of the testator, and the legacy having priority to hers."

Upon appeal from an order made by the surrogate directing the payment to the petitioner of a portion of her legacy, *held*, that in order to give jurisdiction to the surrogate, it must appear that there is a surplus of assets by at least one-third, and that, as in this case, no proof on this point appeared to have been taken before the surrogate, the order was unauthorized.

*BARNES v. BARNES*..... 288

2. — *Bond — form of.*] That the bond did not conform to the statute, which required it to be conditioned for the refunding of the money *whenever required*, and not simply if necessary for the payment of debts and prior legacies. *Id.*

**LETTERS PATENT** — *For lands formerly used for the canals of this State and declared abandoned — are presumed to have been regularly issued.*

*See* PEOPLE v. STEPHENS..... 17

**LEVY** — *By sheriff — when sufficient to sustain replevin or action for conversion.*] 1. A sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife.

*Held*, that the act of the sheriff in levying upon the property was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property.

*ALVORD v. HAYNES*..... 26

2. — *Liability, although interest sold amounted to nothing.*] That his liability was not affected by the fact that he claimed to levy upon, and advertised for sale the interest of the husband alone, when the husband had, in fact, no interest therein. *Id.*

3. — *Plaintiff in judgment — when responsible for acts of sheriff.* The facts that the plaintiff, in the judgment, directed the sheriff to get the executions, and consulted and advised with him and approved of his making the levy, are sufficient to sustain a verdict against him. *Id.*

**LICENSE** — *Parol agreement — when it enures as a license.*] Although a parol agreement, having the effect of giving an easement in lands, is void under the statute of frauds, yet it may be valid as a license and protect parties acting thereunder from being guilty of trespass, and the property put by them on the land from being deemed fixtures.

CAYUGA RAILWAY CO. v. NILES..... 170

**LIEN** — *Notice of lien by laborers and material-men against railroad company — what must be shown to establish lien — Chap. 402 of 1854 and chap. 529 of 1870.*] One Robertson entered into a contract with the defendant, a railroad company, to construct forty-seven miles of its road, and thereafter entered into a contract with one McGraw, by which the latter agreed to construct a portion thereof. Subsequently, McGraw having failed to pay his laborers and others who had furnished materials, the latter filed notices as provided by section 4 of chapter 402 of the Laws of 1854, as amended by section 1 of chapter 529 of 1870, and to foreclose these this action was brought against the company and McGraw. At the time the notices were filed nothing was due to McGraw.

*Held*, that as nothing was due to McGraw at the time the notices were filed, the company were not liable to pay the amounts therein set forth.

That, to render the company liable, it must also be shown that it was, at the time of the filing of the notices, indebted to Robertson on its contract with him. *SAMPSON v. BUFFALO, N. Y. AND P. R. CO.*..... 290

— *When taxes in New York city become.*

*See SKIDMORE v. HART*..... 441

— *Who may create it under chapter 482 of 1862 — Canal boat — a vessel within the meaning of the law.*

*See FRALICK v. BETTS*..... 632

— *Mortgage given to secure future advances — advances made after attaching of subsequent liens — are subject to such liens.*

*See HALL v. CROUSE*..... 557

— *Of collector's bond — resembles judgment not mortgage lien.*

*See UPHAM v. PADDOCK*..... 171

## **LIFE INSURANCE :**

*See INSURANCE.*

**LIMITATION** — *Of time to bring an action on a policy of insurance — after its reformation.*] The policy of insurance contained a clause providing that the company should only be liable for any deficiency that might remain after the plaintiff had exhausted the primary security, which clause, on action brought, was stricken out. The policy also provided that no suit or action for the recovery of any claim by virtue of the policy should be sustainable in any court, unless it was brought within twelve months after the loss had occurred.

*Held*, that the clause in the policy as written, requiring the primary security to be first exhausted, was inconsistent with such a provision, and that it did not, therefore, apply to the case of insurance of the interest of a mortgagee; that under the contract, as it was claimed to be by plaintiff, the cause of action did not accrue until the entry of the judgment reforming the policy.

HAY v. STAR FIRE INSURANCE COMPANY..... 496

**LOCOMOTIVE** — *Duty of railroad as to condition of — company bound to use the known and recognized appliances for preventing the escape of sparks therefrom, and such as are best adapted for that purpose.*

*See BEVIER v. DELAWARE AND HUDSON CANAL CO.*..... 254

**LOSS** — *Proof of — on one of several policies in the same company on the same property, payable to the same person — when sufficient for all — Insurance of party "as interest may appear" — effect of — Loss payable to A B — entitles A B to recover the entire amount, though in excess of his individual loss.*

*See DAKIN v. LIV. AND LONDON AND GLOBE INS. CO.*..... 123

**MAINTENANCE AND SUPPORT**—*Assignment of property, in consideration of a covenant by the assignee to support the assignor—does not constitute a trust.*] This action was brought by the plaintiff, as receiver of one C., appointed in proceedings supplementary to an execution issued upon a judgment recovered against the latter. After the creation of the debt upon which the judgment was recovered, C. entered into a written agreement with one S., his son-in-law, by which he conveyed to S. all his personal property and a contract for the purchase of land, amounting, in all, in value, to about \$2,100; and S. agreed, in consideration thereof to support the said C. during his life, and his minor son until he attained the age of sixteen years, and to send the latter to a common school.

In this action, brought by plaintiff to annul the transfer, sell the property and pay the debt from the avails, the court held that the transfer was, in fact, an assignment of said property in trust for the use of C., and such trust was void as against the creditors of the latter. *Held*, that this was error.

HUNGERFORD v. CARTWRIGHT..... 647

—*Abandonment of husband by wife—right of wife to compel a provision for her maintenance.*

See NOE v. NOE..... 436

**MALICE**—*Inference as to in an action for malicious prosecution.*

See JENNINGS v. DAVIDSON..... 393

**MALICIOUS PROSECUTION**—*Action for—malice—inference as to.*

See JENNINGS v. DAVIDSON..... 393

**MANAGING AGENT**—*Of corporation—who is—for the purpose of service of summons.*] One Treat, the president and superintendent of a street railway in Auburn, was, on June 1, 1876, employed by the president of the defendant, a steam railroad company, to superintend the running of horse cars on a portion of defendant's road not yet completed. Treat had no authority to make contracts for the defendant, except to purchase horses and feed; nor had he any control over or knowledge of the affairs of the defendant, or its books; his employment was to continue during the president's pleasure.

*Held*, that a summons, in an action against the defendant, could not be served upon him as its "managing agent."

EMERSON v. AUBURN AND OWASCO LAKE R. R. Co. .... 150

**MANDAMUS**—*Canal Appraisers—refusal to make return to canal board.*] Upon an appeal by a claimant to the canal board from a decision of the Canal Appraisers, the latter refused to make a return to the appellate tribunal, on the grounds, first, that the appeal was not taken in time; and, second, that the relator had settled his claim and given a release in full therefor.

*Held*, that both of these questions were to be considered and decided by the appellate tribunal, and not by the Canal Appraisers, and that a *mandamus* should issue compelling the appraisers to make the required return.

PEOPLE EX REL. FREER v. CANAL APPRAISERS ..... 64

**MAPS**—*Fees paid for preparation of, cannot be taxed as disbursements.*

See PROVOST v. FARRELL..... 303

**MARRIED WOMAN**—*Services rendered by—husband must maintain action for.*] 1. This action was brought by the plaintiff, a daughter of David Quackenbush, deceased, against his executor, to recover for services rendered by her in attending upon her father during his last illness, she being then married and living with her husband. *Held*, that the husband, and not the plaintiff, was the proper person to bring the action. CUCK v. QUACKENBUSH .... 107

2. —*Statute of limitations—Mutual account—proof of.*] She also claimed to recover for services rendered before her marriage, to which the statute of limitations was pleaded. To remove the bar of the statute, she proved an account in which she had charged her father with the services, and credited him with various amounts, the credits being for such articles as a father would naturally give to a daughter living with him, although of age. No account was kept by her father. *Held*, that the simple presentation of an account

**MARRIED WOMAN** — *Continued.*

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containing such credits to the executor was not sufficient; that an account of her father against her should be regularly proved, in order to have the effect of taking the case out of the statute. *Id.*

3. — *Liability of, on note, when her husband has entire control of her business.*] An action was brought to recover the amount of a promissory note made by the defendant, a married woman, who owned a farm of 330 acres, on which she lived with her husband. He had no property, but carried on the farm for her and bought and sold whatever he pleased, using her money by her consent. Every thing he bought became hers. The proceeds of the note, as soon as received, were given by her to her husband, and were not used by him for plaintiff's benefit or that of her separate estate.

*Held*, that the defendant was engaged in carrying on the business of farming through her husband, acting as her agent, and that she was liable for the amount of the note. *SMITH v. KENNEDY*..... 9

4. — *Action upon bond given by — complaint in — what allegation it must contain.*] In an action against a married woman and her husband upon a bond executed by them, it is sufficient if the complaint alleges the execution, and delivery thereof by the defendants to the plaintiff, and set forth a copy of the bond. It is not necessary that it should contain any allegation as to her separate property or business. *BROOME v. TAYLOR*..... 341

5. — *Conveyance by — under chap. 90 of 1860 — assent of husband to — effect of failure of.*] Under section 3 of chapter 90 of 1860, providing that "any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same; but no such conveyance or contract shall be valid without the assent in writing of her husband", a conveyance by a married woman of her real estate was good as against all the world but her husband.

The assent of the husband need not be given prior to, or at the time of the delivery of the deed, but may be subsequent thereto.

*WING v. SCHRAMM*..... 377

**MARITIME LIEN** — *Chapter 482 of 1862 — constitutionality of — who may create a lien under — Canal boat — a vessel within the meaning of the act.*

*See FRALICK v. BETTS*..... 632

**MARSHALLING OF ASSETS** — *Bond signed by partners individually — when it constitutes a firm obligation — remedy against the individuals and also against the receiver of the firm.*] In April, 1873, two mills in the State of Connecticut were indebted to the firm of Hoyt, Spragues & Co., in the sum of \$1,000,000, the payment of which was guaranteed to them by one Chapin; one of the members of the firm, acting in behalf of the firm and of Chapin, applied to certain banks for the purpose of procuring a loan of \$600,000, which loan was made upon the execution of a joint and several bond for that sum by Chapin as principal, and by the individual members of the firm of Hoyt, Spragues & Co., as sureties, and of a mortgage as collateral thereto, given by Chapin. The money arising from the loan was applied upon the debt guaranteed by Chapin. Subsequently the firm of Hoyt, Spragues & Co. became insolvent, and default having been made in payment of the interest, the mortgage was foreclosed. In this proceeding it was sought to recover from the receiver of the firm assets, the deficiency arising upon the sale.

*Held*, that as the bond, although signed by the members of the firm, as individuals, was in fact given to secure the payment of a debt due to the firm, and was for its benefit, it was, therefore, a firm obligation, and was payable out of its assets.

*Held*, further, that the fact that actions had already been commenced in this court against the surviving sureties, and the executors of those who were dead, did not prevent its enforcement against the firm.

*BERKSHIRE WOOLEN Co. v. JUILLARD*..... 507

— *By receiver of partnership — bond signed by partners individually — when it constitutes a firm obligation.*

*See BERKSHIRE WOOLEN Co. v. JUILLARD*..... 507

**MASTER AND SERVANT:**

*See PRINCIPAL AND AGENT.*

**MEMORANDA** — *When admissible in evidence.*] Upon the trial of this action, brought by the plaintiff to recover for the breach of a contract made with her by the defendant's predecessor, the principal issue of fact was as to the genuineness of the signature of the school commissioner, Strough, to a certificate that she was qualified to teach. Upon the trial Strough was called as a witness, and testified that to the best of his knowledge and belief he did not sign or issue the certificate. He also testified that he kept a book, in which he entered the certificates issued by him during the month in which the certificate in question bore date. The counsel for defendant produced this book and offered it in evidence to show that it contained no entry of the certificate in question. Upon plaintiff's objection, the book was excluded. *Held*, that its exclusion was error.

The counsel for defendant asked Mr. Strough whether, during his term of office, he was accustomed to issue such certificates except upon a personal examination of the applicant, which question was, upon the objection of plaintiff's counsel, excluded. *Held*, that this was error.

MORROW v. OSTRANDER..... 219

**MILL OWNERS** — *Rights of, as to detention of water.*] 1. The defendant was the owner of a dam, and drew therefrom water to run his mill, and the plaintiff drew water from a dam situated on the same stream, below that of the defendant. The surplus waters from defendant's dam was sufficient to furnish the supply needed for the plaintiff's mill, except in times of drought, when defendant was obliged to shut the gates of his mill during the night to accumulate a supply for the next day, thereby cutting off the supply from plaintiff's mill during the time defendant's reservoir was filling. Defendant's mill was run only during the day, while that of plaintiff was run night and day. In an action brought to restrain the defendant from cutting off the flow of water during the night, the referee found that the detention was necessary, and for the sole purpose of enabling the defendant to propel its machinery during the day, and that such detention and use of the water was reasonable. *Held*, that the injury sustained by the plaintiff, by reason of such detention, was one for which the law afforded no remedy.

BULLARD v. SARATOGA VICTORY MFG. CO..... 43

2. — *Burden of proof as to the amount used.*] The plaintiff was only entitled to the use of a limited quantity of water. *Held*, that it rested upon him to show that the quantity used by him was less than that to which he was entitled. *Id.*

**MISJOINDER** — *Of counts in indictment.*] Where it is claimed that there is a misjoinder of counts in an indictment because the first count charges a misdemeanor only, and the second count a felony, the proper remedy is to put the district attorney to his election, or to ask the court to give proper instructions to the jury as to their verdict; such misjoinder does not entitle the defendant to have the indictment quashed, except in the discretion of the court. PEOPLE EX REL. PHELPS v. GENERAL SESSIONS..... 396

**MORTGAGE** — *Recording acts — assignment — latent defect in acknowledgment — effect of — discharge of mortgage by mortgagee, after assignment of.*] 1. In March, 1873, one R. was the owner of premises subject to a mortgage for \$8,000 held by one Aymar. R. desiring to raise more money, a mortgage for \$7,000 was executed to one Pardee, dated March 25, 1873, and recorded April 4, 1873, but Pardee having refused to make the loan the plaintiff agreed to advance the money and took an assignment of the mortgage from Pardee, dated April 16, 1873, and recorded April 17, 1873. The acknowledgment to this assignment, though regular upon its face was, in fact, taken by a notary public of New York county out of his county, to wit, in the State of New Jersey. Subsequently Aymar desiring to have his money a search was made by the Seaman's Savings Bank, which had agreed to furnish the money, and the Pardee mortgage discovered; thereafter by an arrangement between Pardee and R. the former executed a satisfaction-piece of the mortgage and an entry was made by the Register to the effect that the same was discharged of record; the assignment to the plaintiff being then on record. Subsequently another mortgage was given upon the premises and the same was thereafter assigned to defendant H. In an action to foreclose plaintiff's

**MORTGAGE — Continued.**

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mortgage it was claimed that the acknowledgment to the assignment from Pardee to plaintiff was void and its record was not notice to subsequent mortgagees.

*Held*, that the plaintiff having acquired title to the mortgage which was recorded, and the assignment and certificate of acknowledgment being in due form and recorded, notice was thereby given to all subsequent purchasers or mortgagees that he was the owner thereof, and his rights were not affected by the discharge of the mortgage by the Register ;

That the recording of the assignment to plaintiff, as a *notice to subsequent mortgagees*, was not invalidated by proof that the acknowledgment was taken in New Jersey by a notary public of New York county, when his certificate was in due form and purported to have been taken in New York.

HEILBRUN v. HAMMOND..... 474

2. — *Usury in — by whom, after conveyance of the mortgaged property, it may be set up.*] One Nelson, on October 13, 1874, in pursuance of an usurious agreement entered into between himself and the plaintiff, executed and delivered to it four bonds and mortgages. On February 19, 1875, he conveyed the property covered thereby to one L., subject to the mortgages. On March 15, 1875, L. conveyed the same, subject to the mortgages, to W., who, on March 23, 1876, reconveyed the premises to Nelson, the conveyance not being stated to be subject to the mortgages.

In an action brought to foreclose the mortgages, *held*, that Nelson, being the "borrower," and the mortgages being liens only upon his own property, was entitled to set up the defense of usury and have the bonds and the mortgages collateral thereto declared null and void.

*Quære*, whether, if any of the intermediate grantees of the property had become bound for the payment of the bond and mortgage, the mortgage might not be considered as collateral security for that liability, and enforceable with it. KNICKERBOCKER LIFE INS. CO. v. NELSON..... 321

8. — *Direction to pay part of the amount thereby secured to the heirs and executors of the mortgages — effect of assignment by mortgagee — payment to assignee.*] One Benham conveyed certain real estate to one Pennock, and took back a purchase-money mortgage for \$2,800, as to \$1,400 of which it was provided that, as Benham's wife had refused to join in the deed, it should be set apart as an indemnity against her claim of dower, the interest to be paid to Benham during his life, and in case he survived his wife, the principal to be paid to him or his heirs, executors or administrators; in case she survived him the interest to be paid to her during her life, if she elected to receive it instead of claiming her dower, and if not, then no interest to be paid until her death, but the principal to be paid within twelve months thereafter to the heirs, executors or administrators of Benham. Benham assigned the mortgage, and the same was paid and by the assignee satisfied of record. The wife survived the husband and elected to take the interest of \$1,400, instead of her dower. After her death the administrator of Benham brought this action, claiming that Benham had no right to assign the mortgage; that the \$1,400 therein reserved was made a trust fund for the benefit of Benham's heirs, and that the payment to the assignee did not satisfy the same.

*Held*, that the assignment by Benham was valid, and that the payment to the assignee satisfied and discharged the mortgage. BENHAM v. PENNOCK... 103

4. — *Foreclosure, action for — costs — error of referee as to — how corrected.*] In an action to foreclose a mortgage the costs are in the discretion of the court.

Where a referee in such a case decides that the plaintiff is only entitled to certain costs, his error, if any, can only be corrected by an appeal from the judgment, and not upon a motion. LOSSEE v. ELLIS..... 656

5. — *To secure future advances — advances made after attaching of subsequent lien.*] A mortgage may be executed or a judgment confessed as security for future advances, to be made in pursuance of a contemporaneous agreement, and such mortgage or judgment will be valid and effectual as against subsequent incumbrancers having notice thereof. All advances made after the attaching of a subsequent lien, by mortgage or judgment, are subject to

**MORTGAGE—Continued.**

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the priority of the latter lien. The object for which the mortgage is given and the amount of the advances made may be shown by parol.

HALL v. CROUSE..... 557

6. — *Object of, may be proved by parol.*] Parol evidence is also admissible to show that the mortgage was given to secure advances to be made by a party not named in the mortgage. *Id.*

7. — *Security for future costs—may be taken by attorney.*] The English rule prohibiting attorneys from taking, in advance, a security for the payment of the future costs of the litigation is not in force in this State. *Id.*

— *Foreclosure—receiver of rents, etc., of mortgaged premises—what persons in possession may object to his appointment.*

See SMITH v. TIFFANY..... 672

— *Given by purchaser, on sale of infant's real estate—want of title in infant—no defense to.*

See PARKINSON v. JACOBSON..... 817

**MORTGAGE;**

See CHATTEL MORTGAGE.

**MOTION—** *To vacate order of arrest—denied, with leave to renew—renewal of motion after judgment.*

See MILLS v. RODEWALD..... 489

— *Not proper remedy—to correct error as to costs in action to foreclose a mortgage.*

See LOSSEE v. ELLIS..... 656

**MUNICIPAL CORPORATION—** *Commissioners of assessment—affidavit may be ordered heard after report made.*] 1. The commissioners of estimate and assessment, acting under chapter 483 of 1862, had, after hearing the parties interested, prepared their report and a motion to confirm the same had been duly noticed. At this stage of the proceedings, upon the application of certain of the parties interested, the court granted an order directing that certain affidavits should be submitted to, and considered by, the commissioners, or that the same should be used upon the motion to confirm the report of such commissioners as the corporation counsel should prefer. *Held*, that the order was proper and should be affirmed.

MATTER OF DEPARTMENT OF PUBLIC WORKS..... 488

2. — *Liability of, for accident caused by obstruction in highways—for injury occasioned by accident.*] The defendant placed on the west side of Mohawk street, in the city of Cohoes, a hydrant, projecting several inches beyond the curb, with an iron nozzle on the side nearest the street, which projected several inches over the road-bed, at the height of about two feet. On the opposite side of the street the defendant had negligently allowed to accumulate a pile of ashes twenty feet along, ten feet wide and three feet high, the space between the pile and the west curb being about twenty feet.

Plaintiff's horse, which he was driving before a sleigh, took fright and ran along the street in the direction of the hydrant; plaintiff was unable to guide or direct him with precision; at that time a wagon was passing the hydrant in an opposite direction, leaving a space of about twelve feet between it and the hydrant; plaintiff's horse, in passing through this space, struck the hydrant or its nozzle, with the cross-bar of the sleigh, whereby the plaintiff was thrown therefrom and injured. Plaintiff used his best endeavors to guide and control his horse, which was blind, and was guilty of no negligence which contributed to the accident. This action was brought to recover damages for the injuries sustained. *Held*, that the facts of the case justified a finding by the referee that the defendant was negligent in allowing the pile of ashes to accumulate and remain in the street, and in erecting and maintaining the hydrant so that it and its nozzle projected into the street, and that the plaintiff was entitled to recover. RING v. CITY OF COHOES.... 77

3. — *Blind horse.*] That the fact that the plaintiff's horse was blind, and that the accident occurred while it was running away, did not relieve the defendant from the liability imposed by its negligence, so long as it appeared

**MUNICIPAL CORPORATION — Continued.**

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that the plaintiff was blameless and free from any negligence contributing to the accident. *Id.*

4. — *Duty of municipal corporation as to streets.*] In making improvements in the public streets, and in keeping them in repair, the officers of the municipality are bound to act with due regard to the safety of travelers; and for any neglect or omission of duty in that regard, an action will lie by any person specially injured thereby. *Id.*

5. — *Liable for combined result of negligence and accident.*] It is the duty of a municipality, bound to construct and maintain highways, to provide for the reasonable safety of travelers in reference to such accidents as may be expected to happen therein; and when a traveler is not in fault, but an injury happens to him, which is the combined result of accident, and of negligence attributable to the municipality because of its omission to keep the road in repair, the latter will be held liable for the damages occasioned thereby. *Id.*

6. — *Common council of Rochester — power of, over fire department.*] A committee of the common council of the city of Rochester directed the fire department of the city to assemble in front of the city hall, at midnight, on the 31st of December, 1875, to celebrate the incoming of the centennial year. This action was brought to recover damages for injuries sustained by plaintiff who was struck by one of the hose carts through the negligence of the driver.

*Held*, that the common council had no authority to direct the fire department to so assemble, and the city was not responsible for injuries occasioned thereby. *SMITH v. CITY OF ROCHESTER*..... 214

7. — *Liability of city for negligence of a member of the fire department.*] That even if the common council had authority to so direct, yet the city would not be liable for the negligence of a member of the fire department while engaged in the performance of his legitimate duty as such, whether in exercising, as directed by the common council, or in endeavoring to prevent or extinguish a fire. *Id.*

8. — *Acquisition of fee of land by city — uses to which it may apply it.*] By chapter 547 of 1864, the city of Buffalo was authorized to lay out a public ground for the purpose of maintaining and protecting a sea-wall or break-water along the shore of Lake Erie, and to acquire title in fee to the necessary lands by compulsory proceedings and by conveyances. The act provided that, upon payment or tender to the owner of the compensation awarded for said land, the fee thereof should vest in the city for the said purpose. Subsequently, the defendant, acting in pursuance of a permit from the common council, laid its track upon the said land and used the same for its road. This action of ejectment was brought by the plaintiff, who owned a portion of the land when it was taken by the city, claiming that the city could confer, and the plaintiff acquire, no right to use the land for that purpose; and that, as against defendant, plaintiff was entitled to its possession.

*Held*, that as the fee was vested in the city, and as, under no circumstances, could the land revert to the plaintiff, he had no greater right to complain of the use of the land by the defendant than any other citizen. That in any event an action in ejectment could not be maintained.

*SWEET v. BUFFALO, N. Y. AND PHIL. RY. CO.*..... 643

— *Violation of ordinance of city of Rochester — no length of time of imprisonment for, prescribed by common council — power to imprison in jail does not authorize imprisonment in penitentiary.*

*See MERKEE v. CITY OF ROCHESTER*..... 157

— *Ordinances of — power of policeman to arrest for violation of.*

*See HENNESSY v. CONNOLLY*..... 173

— *Brooklyn — justice of the peace in — jurisdiction of.*

*See GERATY v. REID*..... 313

— *Warden of city prison, New York city — public officer — action against — where triable.*

*See COWEN v. QUINN*..... 344



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— <i>City of Brooklyn</i> —vacating assessments in—burden of proof—section 13 of chapter 638 of 1875. See <i>MATTER OF MEAD</i> .....	349
— <i>Taxes in New York city</i> —when they become a lien—covenant for payment of—construction of. See <i>SKIDMORE v. HART</i> .....	441
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— <i>A civil justice in New York</i> —not an officer or employe of the city government under section 95 of chapter 335 of 1873. See <i>PEOPLE EX REL. PHELPS v. GENERAL SESSIONS</i> .....	396

**MUTUAL ACCOUNT** — *Proof of.*] A married woman claimed to recover for services rendered before her marriage, to which the statute of limitations was pleaded. To remove the bar of the statute, she proved an account in which she had charged her father with the services, and credited him with various amounts, the credits being for such articles as a father would naturally give to a daughter living with him, although of age. No account was kept by her father. *Held*, that the simple presentation of an account containing such credits to the executor was not sufficient; that an account of her father against her should be regularly proved, in order to have the effect of taking the case out of the statute.

*CUCK v. QUACKENBUSH*..... 107

**NEGLIGENCE** — *Fire started by sparks from engine.*] 1. In an action to recover damages for the burning of woodland, by a fire started by the negligence of a railroad company in allowing sparks and coals to escape from its engines, the plaintiff is not required to prove which one of the defendant's engines set the fire. *BEVIER v. DELAWARE AND HUDSON CANAL CO.* 254

2. — *Identification of engine.*] Where he is unable to identify the engine that set the fire, by name or number, or by any other designation, if he prove either by the manner in which it was operated or by the extent to which it scattered fire that it was so far out of repair as to charge the company with negligence, it is sufficient. *Id.*

3. — *Duty of railroad as to condition of engine.*] The counsel for the defendant requested the court to charge that the defendants were not bound to use any other appliances than such as are known in practical use. The court so charged, adding: "that is, the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted to that purpose." *Held*, that the qualification added by the court was proper. *Id.*

4. — *Putting out fire.*] The court charged that the plaintiff was not bound to use extraordinary means to extinguish or prevent the spread of the fire. *Held*, that this was proper. *Id.*

5. — *Contributory negligence.*] The defendant's counsel requested the court to charge that, if the plaintiff allowed dry limbs, brush, grass and other combustible matter to lie and accumulate on his premises adjacent to the line of the railroad, and that if such accumulation contributed to produce the fire, by means of which the premises were burned over, he was not entitled to recover. *Held*, that the request was properly refused; that, whether or not the plaintiff had been guilty of negligence contributing to the injury, was a question for the jury; it was not the province of the court to instruct the jury that certain specified acts or omissions constitute negligence. *Id.*

6. — *Commissioners of highways—duties of, as to bridges.*] The defendants, commissioners of highways, were notified, in June, 1875, that a bridge was defective, no particular defect being pointed out. Within a week, they, in company with an experienced bridge builder, examined the bridge carefully, from above and below, taking off the planks and testing the timber, but could discover no defect. Shortly after, they caused another experienced bridge builder to examine it, and replace old planks by new, where neces-

**NEGLIGENCE — Continued.**

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sary. In the following month, the bridge fell and injured the plaintiff. The accident was caused by one of the timbers being rotten at the center, which defect could only be discovered by cutting the timber in two.

*Held*, that the defendants were guilty of no negligence, and that the plaintiff was not entitled to recover. *HICKS v. CHAFFEE*..... 294

7. — *Action for — Railroad crossing — duty of one passing over.*] The plaintiff's intestate was struck by one of defendant's engines and killed, while driving a team of horses across one of its tracks. Upon the trial counsel for the defendant requested the court to charge that it was negligence on the part of the intestate, if he approached the crossing at such a rate of speed as to be unable to stop or turn his horses aside before going on to the track. The court charged, "that if the intestate approached the track at such speed that he was unable to control or stop his team, without making any effort to apprehend the approach of the train," he was guilty of negligence.

*Held*, that the charge as requested was properly refused, and that as modified it was as favorable to defendant as it was entitled to, except that it was the duty of the plaintiff's intestate to make such effort as was reasonable under the circumstances to ascertain if a train was approaching.

*SALTER v. UTICA AND BLACK RIVER R. R. Co.*..... 187

8. — *Liability of owner of real estate for acts of contractor in doing work upon it.*] The defendant made a contract with one Clynes by which the latter agreed to raise a house, belonging to the former, four feet. The contractor dug a trench in the sidewalk next to the house about two feet wide and of about the same depth and threw the earth upon the sidewalk. The excavation was left unguarded and the plaintiff fell into it and was injured. The defendant did not authorize the trench to be dug, nor did he know of its having been made until after the accident. Its digging was not necessary to the performance of the contract. *Held*, that the defendant was not liable.

The owner of real estate is not liable for acts of a contractor employed to do work upon it unless (1) the contractor is his employee, or (2) unless the work, as authorized by the contract, necessarily produced the injury, or (3) unless the injuries were occasioned by the omission of some duty imposed upon him. *RYDER v. THOMAS*..... 296

9. — *Liability of county for negligence of county treasurer.*] In the year 1875 the plaintiff purchased certain lots of land in the town of Jamaica at a sale, for non-payment of taxes, held by the county treasurer of Queens county, in pursuance of chapter 135 of 1873, and received certificates therefor. The county treasurer failed to serve the notices of redemption upon the owners and mortgagees, as required by the act. After the time for redemption had expired, the plaintiff, his certificates not having been redeemed, tendered them back to the county treasurer and demanded his money, on the ground that the failure of the county treasurer to serve the notices rendered the certificates void.

In an action by him to recover said amount from the county, *held*, that the county was not liable for any loss or damage which might have occurred by reason of the default or negligence of the county treasurer in the discharge of the duties of his office.

That the relation of master and servant did not exist between the county and its county treasurer.

That in conducting the said sale the county treasurer was not in any sense acting on behalf of the county, but was simply discharging certain duties in relation to the unpaid taxes of the town of Jamaica, imposed upon him by the law under which the sale was had.

*DE GRAUW v. SUPERVISORS OF QUEENS Co.*..... 381

10. — *In order to create liability, must contribute to or cause the accident.*] One Barringer was driving, plaintiff's intestate and himself being in a one-horse wagon, on a highway crossing defendant's railroad. While at a safe distance therefrom they became aware of the approach of an engine, and Barringer at once endeavored to stop the horse, and succeeded in checking him, he started again and was again brought under control, but started a third time and ran into the engine. The bell of the engine was not rung as required by law.

**NEGLIGENCE — Continued.**

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In an action to recover damages for the killing of plaintiff's intestate, *held*, that although negligence on the part of Barringer could not be imputed to the deceased, yet as defendant's neglect to ring the bell did not contribute to or cause the accident, the plaintiff could not recover.

COSEBROVE & N. Y. CENTRAL AND HUD. R. R. Co. .... 329

11. — *Public officer—liability of, for neglect of official duty, to person injured thereby.*] The complaint in this action alleged that the defendant was the head of the department of buildings in the city of New York; that it was his duty to see that all unsafe buildings in said city were taken down or made secure, and that he was furnished with the means necessary to fulfill the said duty; that a building, known as No. 25 Duane street, was so injured by fire as to render it unsafe and that defendant had notice of its condition; that the said building fell upon an adjoining building in which the plaintiff's intestate lawfully was and killed her, and asked judgment for damages against the defendant.

*Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, should be overruled.

CONNORS v. ADAMS. .... 427

12. — *Statutes of another State giving right of action for negligent killing—may be enforced by administratrix appointed in this State.*] This action was brought to recover damages arising from the death of plaintiff's intestate, in the State of New Jersey, occasioned by the negligence of the defendant, a foreign corporation. At the time of the accident there was in force in the State of New Jersey a statute, similar to that of this State, giving to the personal representatives of the person killed by the negligence of any person a right of action for the damages occasioned thereby. The plaintiff was appointed administratrix by the surrogate of New York.

*Held*, that the right of action given by the New Jersey statute could be enforced in the courts of this State by an administratrix appointed in this State. STALLKNECHT v. PENNSYLVANIA R. R. Co. .... 451

13. — *Contributory—when question should be submitted to the jury.*] At Kirkville, on the defendant's road, the station and depot are on the north side of the track, and passengers generally get off on the north side of the cars. Along the south side of the track, and very close to it, is a ditch. The plaintiff, a resident of the place and well acquainted with the situation of the depot, attempted to get off the train, on the south side, at a point where the track was intersected by a highway running at right angles with it, at a time when the train had stopped or was running very slowly. The conductor, who was on the north side of the train, not seeing the plaintiff, who was on the lowest step of the car, signalled the engineer to go on, and by his so doing the plaintiff was thrown off and injured. It was proved that when the cars stopped on the highway it was not unusual for parties to alight from the cars on the southerly side of the train, which was the side nearest to the village.

*Held*, that it was error for the court to charge, as matter of law, that the attempt to alight on the southerly side of the train, did not constitute contributory negligence; that whether it did or not, should have been submitted to the jury. PLOPPER v. N. Y. C. AND H. R. R. Co. .... 625

14. — *Contributory—when a question for the jury.*] This action was brought to recover damages for the death of plaintiff's intestate alleged to have been caused by defendant's negligence. At Amboy the defendant had four tracks, numbered from the south 1, 2, 3 and 4; 1 and 2 being for passenger, and 3 and 4 for freight cars. Upon land adjoining the southerly tracks owned by the defendant, it had erected a station and a plank sidewalk leading westerly about 100 feet to a highway. At the time of the accident the plank-walk was so obstructed with snow as to be impassable. East of the highway cattle guards had been constructed, the southerly two being planked over and the northerly two left open, but the two latter were, at the time of the accident, so filled and covered over with snow, as to be entirely concealed.

The plaintiff's intestate who lived on the aforesaid highway, a few rods northerly from the crossing, arrived at Amboy in the morning with two children, one about three years old and the other an infant, and was assisted from

**NEGLIGENCE** — *Continued.*

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the cars on the southerly side of track No. 2; she started to walk westerly and diagonally across the tracks toward the highway, the shortest route to her house; a gravel train was approaching on track No. 3; after she had walked about fifty feet she fell into the cattle guard which was concealed by the snow, and before she could extricate herself she was run over by the gravel train and killed. If she had not so fallen she would have had time enough to cross the track before the train would have reached that point. The justice at the Circuit granted a nonsuit. *Held*, that this was error and that the case should have been submitted to the jury.

- HOFFMAN v. N. Y. CENTRAL AND H. R. R. Co. .... 589
- *Turning cows on to highway crossed by railroad track.*  
*See* FITCH v. BUFFALO, N. Y. AND PHIL. R. R. Co. .... 668
- *Common council of Rochester — power of, over fire department — liability of city for negligence of a member of the fire department.*  
*See* SMITH v. CITY OF ROCHESTER. .... 214
- *Liability of municipal corporation for injury resulting from its negligence and from accident combined.*  
*See* RING v. CITY OF COHOES. .... 77
- *Of attorney, in conducting suit — what is.*  
*See* SEYMOUR v. CAGGER ..... 29

**NEGOTIABLE PAPER:**

*See* PROMISSORY NOTE.

**NEW TRIAL** — *on ground of newly-discovered evidence — costs of former trial — must be paid by applicant for.*

- See* COMSTOCK v. DYE. .... 118
- *granted on payment of costs — where a judgment upon which the judgment in the principal action is recovered, is reversed.*  
*See* SMITH v. REDFIELD. .... 489
- *Not necessary to move for, in the County Court — on appeal from a judgment entered on the report of a referee therein.*  
*See* KILMER v. O'BRIEN ..... 224

**NEWLY-DISCOVERED EVIDENCE** — *New trial, on ground of — only granted on payment of costs of former trial.*

*See* COMSTOCK v. DYE. .... 118

**NEW YORK CITY** — *Taxes in — when they become a lien — covenant for payment of.* 1. On March 30, 1875, certain premises in the city of New York were leased to the defendant for ten years from May 1, 1875, the latter agreeing, during the term of the lease, to pay and discharge all such assessments, extraordinary as well as ordinary, as should be levied, assessed, imposed or grow due and payable upon, out of or for the demised premises, and all parts thereof.

In New York the assessment rolls are open for examination from the second Monday in January to April thirtieth, and are returned to the board of supervisors on the first Monday of July in each year, and the amount of the tax is thereafter set down opposite to the items of real and personal property on the list. *Held*, that the tax for the year 1875 grew due and became payable after the commencement of the term and that the defendant was bound to pay the same. SKIDMORE v. HART. .... 441

2. — *A civil justice in — not an officer or employe of the city government under § 95 of chap. 335 of 1873.* A civil justice of one of the District Courts in the city of New York is not "an officer of the city government or a person employed in its service" within the meaning of section 95 of chapter 335 of 1873. PEOPLE EX REL. PHELPS v. GENERAL SESSIONS. .... 396

3. — *Public officer — action against — where triable.* The warden of the city prison in New York is a public officer, and an action brought to recover damages for an act done by him in virtue of his office, must be tried in the county of New York. COWEN v. QUINN ..... 344

4. — *Commissioners of assessment — affidavit may be ordered heard, after*

**NEW YORK CITY** — *Continued.*

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*report made.*] The commissioners of estimate and assessment, acting under chapter 483 of 1862, had, after hearing the parties interested, prepared their report and a motion, to confirm the same had been duly noticed. At this stage of the proceedings, upon the application of certain of the parties interested the court granted an order directing that certain affidavits should be submitted to, and considered by, the commissioners, or that the same should be used upon the motion to confirm the report of such commissioners as the corporation counsel should prefer.

*Held*, that the order was proper and should be affirmed.

**MATTER OF DEPARTMENT OF PUBLIC WORKS**..... 483

— *Superintendent of department of buildings in — liability of, for neglect of official duty, to person injured thereby.*

*See* **CONNORS v. ADAMS**..... 427

**NON-RESIDENT DEBTOR** — *Fraudulent conveyance by — what must be done by creditor before he can attack it.*] Where an action is brought against a debtor of the plaintiff and one to whom such debtor has fraudulently conveyed certain real estate, while so indebted, to set aside such conveyance and to satisfy plaintiff's claim from the proceeds arising upon the sale thereof, it must be alleged in the complaint and proved upon the trial, that plaintiff has recovered a judgment against the debtor and has exhausted all available legal remedies against him.

It is not sufficient to show that the debtor is a non-resident of this State and has no property herein, so long as it appears that he is living in another State, and may be proceeded against by the ordinary forms of law existing therein. **BALLOU v. JONES**..... 629

**NOTARY PUBLIC** — *Certificate of acknowledgment by, in due form — effect upon the validity of the record of the instrument acknowledged — of proof that it was taken out of the jurisdiction of the officer.*

*See* **HEILBRUN v. HAMMOND**..... 474

**NOTE :**

*See* **PROMISSORY NOTE.**

**NOTICE** — *Of change of route of railroad.*] 1. The notice required by the statute (§ 22 of chap. 140 of Laws of 1850, as amended by chap. 560 of the Laws of 1871) to be given on an application for a change of the proposed route of a railroad company, must be personally served.

*Quære.* Whether, in a case where personal service is impracticable, the court would have power, under the seventh subdivision of section 14, to direct service to be made in some other mode.

**PEOPLE EX REL. N. B. AND C. R. R. Co. v. L. AND B. R. R. Co.**..... 211

2. — *Recording act.*] The recording of an assignment of a mortgage, as a notice to subsequent mortgagees, is not invalidated by proof that the acknowledgment was taken in New Jersey by a notary public of New York county, when his certificate is in due form and purports to have been taken in New York.

**HEILBRUN v. HAMMOND**..... 474

3. — *School commissioners — power of, to alter or divide Union Free School district.*] An order to that effect cannot be made, without giving to the trustees of the district a week's notice that at a time and place specified by him he will hear their objections to the proposed alteration.

**PEOPLE EX REL. BOARD OF EDUCATION v. HOOPER**..... 639

— *The notice served with the return of an answer on account of a defective verification, must point out specifically the particulars in which it is defective.*

*See* **SNAPE v. GILBERT**..... 494

**NUISANCE** — *Complaint — alleging obstruction of highway — public nuisance — when an action to abate, is maintainable.*

*See* **VAN BRUNT v. AHEARN**..... 388

**OFFER** — *In an action to set aside a contract for fraud — to restore what was received under the contract — when necessary to be made in the complaint.*] Where

**OFFER** — *Continued.*

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an action is brought to set aside a contract, on the ground that the plaintiff was induced to enter into it through the fraud of the defendant, it is not necessary that the complaint should contain an offer to restore what has been received under it.

It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary. *HAY v. HAY*. . . . . 315

— *To allow judgment to be taken for one of several claims — effect of, on right to sever causes of action.*

*See* *BRADBURY v. WINTERBOTTOM*. . . . . 536

**ORDER** — *Of arrest — Rule 6 of 1874 — what a sufficient compliance with.]*

1. It is a sufficient compliance with Rule 6 of the Rules of 1874, requiring the sheriff to file with the clerk the order of arrest and affidavits on which it was granted, and directing that a copy of the rule be indorsed on the order of arrest before its delivery to the sheriff, if the substance of the rule be indorsed upon the outside of the original papers given to the sheriff, although such indorsement be omitted from the copy of the papers served upon the person arrested. *KOPELOWICH v. KERSBURG*. . . . . 178

2. — *What not appealable.]* An order of the Special Term denying a motion for judgment on the ground of the frivolousness of a demurrer, is not appealable to the General Term. Such an appeal is expressly forbidden by section 537 of the Code of Civil Procedure. *SMITH v. RATHBUN*. . . . . 47

— *Directing settlement of issues — discretionary with court — order directing, is not appealable.*

*See* *SEYMOUR v. MCKINSTRY*. . . . . 284

— *An order striking out an answer as frivolous is appealable.*

*See* *WEBSTER v. BAINBRIDGE*. . . . . 180

— *Only one appeal therefrom, or from part thereof, allowed.*

*See* *THOMPSON v. TAYLOR*. . . . . 201

— *Laying out highway — must contain survey.*

*See* *PRATT v. PEOPLE*. . . . . 684

**PAROL AGREEMENT** — *Easement cannot be created by — not to be performed under one year.]*

1. The defendant's assignor having a five years lease of certain lands, upon which was a stone quarry, entered into a parol agreement with plaintiff's assignor, by which the latter, a railroad company, were to lay a side track to the quarry over the leased land, and were to be allowed to take such loose dirt and stone as they might need for their road, for which they were to pay plaintiff's assignor \$100 per year, and he was to use the side track to ship his stone. The agreement was to continue during the term of the lease. Subsequently the plaintiff, having become vested with all the rights of the first company, paid fifty dollars on account of the rent and used the side track to draw stone and dirt. Thereafter desiring to abandon the agreement and take up the tracks, they were prevented by the defendant from removing the same.

In this action of replevin, brought by the railroad company to recover the iron and ties and for damages for the detention of the same, *held*, that the effect of the agreement would be to give the company an easement in the land upon which the tracks were laid, and that, as it was a parol agreement, it was void under the statute of frauds.

That it was also void, because it was a contract not to be performed within one year. *CATUGA RAILWAY CO. v. NILES*. . . . . 170

2. — *When it inures as a license.]* That the agreement, though void as a contract, was valid as a license; the company were not therefore trespassers in laying the tracks thereunder, and that for that reason the rails and ties so laid down did not become fixtures. (*Id.*)

3. — *Boundary line — when it can be established by parol.]* Where a boundary line is uncertain, indefinite and disputed, the owners of the adjoining lots may agree upon and establish, by parol, a line, which neither can afterwards dispute. *AMBLER v. COX*. . . . . 295

**PAROL CONTRACT** — *For purchase of lands, for partnership — liability of partners under.*  
*See WILLIAMS v. GILLIES* ..... 422

**PARTIAL INTEREST** — *In subject of suit — entitles party to recover entire amount, though in excess of his interest.*  
*See DAKIN v. LIV. AND. LOND. AND GLOBE INS. CO.* ..... 123

**PARTICULARS:**  
*See BILL OF PARTICULARS.*

**PARTITION** — *Action of — allegations of complaint — Rule 78 of 1876 — demurrer.* In an action for partition, in which one of the defendants was an infant, the complaint alleged that the land therein described was the only real estate owned in common by the defendants. The defendant demurred on the ground that it was not averred that the lands described in the complaint were the only lands owned in common by the parties as required by Rule 78 of the Rules of 1876.

*Held*, that the demurrer was properly overruled; that if the allegation was defective it was because of its uncertainty and the remedy was by motion and not by demurrer. *MOFFATT v. McLAUGHLIN* ..... 449

— *Action for, under act of 1853, relating to disputed wills — maintainable when property was devised by will to an alien.*  
*See HALL v. HALL* ..... 806

**PARTNER** — *Undertaking — by continuing partner to secure payment of firm liability — what covered by — what constitutes a payment.* The plaintiff, upon dissolving a partnership, conveyed all the assets to the continuing partner, Thompson, who, having agreed to pay and discharge all firm liability, gave to the plaintiff a bond, signed by himself and the defendants, as sureties, conditioned to pay all the debts and liabilities owing by the firm, due or to become due, and to save plaintiff harmless from the payment of any and all firm debts and liabilities, of every name and nature, then owing by them. Subsequently, actions were commenced against the plaintiff and Thompson upon certain notes given by the firm. The summons was served upon Thompson alone, who engaged an attorney to appear for both, and who suffered judgment to go by default. Plaintiff, having obtained leave to open the judgment, defended the action and procured the complaint to be dismissed. This action was brought to recover the amount paid to plaintiff's attorneys for their services in defending the action, plaintiff having given his promissory note to them for the amount, which was accepted by them in payment thereof. *Held*, that the attorneys having accepted plaintiff's note in payment of their bill, he was entitled to recover the amount as money actually paid by him. That the amount so paid was within the condition of the bond, and that the sureties were liable therefor. *DRAKE v. PORTER* ..... 658

**PARTNERSHIP** — *For purchase of land — oral agreement for — liability of partners.* 1. Dobbs, Raynor and Gillies agreed, orally, that Dobbs should purchase certain real estate in his own name and give back a mortgage thereon for part of the purchase-money; the real estate to be held for speculative purposes and sold for the joint benefit of all; the profits to be divided among them in proportion to the amount contributed by each. Dobbs accordingly purchased the property and gave back a mortgage to plaintiff's testator, who was at the time ignorant of the partnership. In an action to foreclose the mortgage the judgment directed that each of the partners should be liable for such proportion of any deficiency that might arise upon the sale as corresponded to his interest in the land.

*Held*, that this was as favorable a judgment for the partners as they were entitled to; that under such circumstances the name of the partner, used in the transaction, becomes, *pro hac vice*, the partnership name.

*WILLIAMS v. GILLIES* ..... 422

2. — *Bond signed by partners individually — when it constitutes a firm obligation — remedy against the individuals and also against the receiver of the firm.* In April, 1873, two mills in the State of Connecticut were indebted to the firm of Hoyt, Spragues & Co., in the sum of \$1,000,000, the payment

**PARTNERSHIP** — *Continued.*

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of which was guaranteed to them by one Chapin; one of the members of the firm, acting in behalf of the firm and of Chapin, applied to certain banks for the purpose of procuring a loan of \$600,000, which loan was made upon the execution of a joint and several bond for that sum by Chapin as principal, and by the individual members of the firm of Hoyt, Spragues & Co., as sureties, and of a mortgage as collateral thereto, given by Chapin. The money arising from the loan was applied upon the debt guaranteed by Chapin. Subsequently the firm of Hoyt, Spragues & Co. became insolvent, and default having been made in payment of the interest, the mortgage was foreclosed. In this proceeding it was sought to recover from the receiver of the firm assets, the deficiency arising upon the sale.

*Held*, that as the bond, although signed by the members of the firm, as individuals, was in fact given to secure the payment of a debt due to the firm, and was for its benefit, it was, therefore, a firm obligation, and was payable out of its assets.

*Held*, further, that the fact that actions had already been commenced in this court against the surviving sureties, and the executors of those who were dead, did not prevent its enforcement against the firm.

BERKSHIRE WOOLEN CO. v. JUILLARD..... 507

**PARTY**—*To action — refusal of, to produce paper — contempt — striking out complaint.*] Upon the trial of this action, brought to foreclose a bond and mortgage, in which the defense was payment, the plaintiff having been subpoenaed to produce the bond was called as a witness and asked if he had it, to which he said he did not have it; that he did not have it in his possession when subpoenaed. The court then stated that the question was, whether he had control of it. After about an hour had been occupied by counsel in his efforts to find out where the bond was, the counsel for the plaintiff stated that he had it in his pocket, and being asked by the court if he would produce it said that he declined to do so at present, whereupon the justice ordered the complaint to be stricken out.

*Held*, that this was proper. SHELF v. MORRISON..... 110

— *To action — the husband and not the wife is the proper party plaintiff in an action to recover for services rendered by the wife after her marriage.*

See CUCK v. QUACKENBUSH..... 107

**PARTIES** — *Defect of — waived if not set up in answer.*

See RISLEY v. WIGHTMAN..... 163

**PASSENGER** — *Right of, to stop over on railroad ticket.*

See TERRY v. FLUSHING, N. S. AND C. R. R. Co..... 359

**PAYMENT** — *A note, in order to have the effect of extending the time of payment of a past debt, must be negotiable.*] In an action to recover for liquors sold to the defendant, the defendant set up that the plaintiff had accepted the defendant's promissory note for the amount due, whereby the time for the payment of the debt was extended, and that such note was not yet due.

*Held*, that as the answer did not allege that the note so accepted was a negotiable note, it was properly overruled as frivolous.

WEBSTER v. BAINBRIDGE..... 180

— *Acceptance of a note in payment of a bill — constitutes a payment thereof as to third persons.*

See DRAKE v. PORTER..... 658

**PENDENCY OF FORMER ACTION** — *Plea of — relates to time of commencement of suit in which it is interposed.*] 1. On July 7, 1875, the plaintiff herein commenced an action against the defendants upon an undertaking given by them. A demurrer interposed by them was overruled at the Special Term, but sustained upon an appeal to the General Term; and on January 3, 1876, judgment was entered therein dismissing the complaint with costs. On February 17, 1876, this action was commenced by the same plaintiff against the same defendants upon the same cause of action. March 11, 1876, the plaintiff appealed, in the first action, from the decision of the General Term to the Court of Appeals. March seventeenth the defendants



**PENDENCY OF FORMER ACTION** — *Continued.*

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served an answer in this action, setting up as a defense that another action was pending between the same parties for the same cause of action.

*Held*, that the plea referred to the time of the commencement of the action; that, at that time, the former action had been terminated by a final judgment upon the demurrer, and was no longer pending, and that the plea should, therefore, be overruled. *PORTER v. KINGSBURY*..... 83

2. — *Remedy.*] *Semble*, that the defendant's remedy was to apply for a stay of proceedings in this action, during the pendency of the appeal in the first. *Id.*

**PERFORMANCE** — *In full* — *not a condition precedent to a recovery on a divisible contract.*

*See PER LEE v. BEEBE*..... 89

**PHYSICIAN** — *Cannot disclose facts acquired while attending patient.*]

1. Upon the trial, Dr. E., who had testified that he had treated D. and prescribed for him in the spring and summer of 1862, was asked, "What did you do by way of treatment to him?" "Was he cured when he left your hands?" "Was he better or worse after you ceased treating him?" *Held*, that the court properly refused to allow the questions to be answered, as they were forbidden by the statute (3 R. S., 406, § 73) prohibiting a physician from disclosing information acquired by him in attending a patient professionally.

He was then asked whether, in May, 1867, in his opinion, "D. was in good health, and of sound body, and one who usually enjoyed good health?" *Held*, that the question was objectionable, as the opinion of the witness must necessarily be based, in part at least, on the information acquired by him in his professional attendance on D.

A physician was called who testified that he had examined D. for insurance in the Phoenix Life Insurance Company about the time of the second application in this case, and passed him as insurable. Upon cross-examination, he was asked if he would have recommended D. for insurance if the latter had informed witness that he had been treated by any of the five physicians who had attended him for a disease which he was unwilling to disclose, or that he had been under treatment for five years. *Held*, that the opinion of the witness as to what he would have done had those statements been made to him was of no importance, and was properly rejected.

*EDINGTON v. ÆTNA LIFE INS. CO*..... 548

2. — *Prohibition of disclosure may be waived.*] The prohibition imposed by the statute upon a physician, preventing him from disclosing information acquired by him in attending upon a patient professionally, is for the benefit of the patient, and may be waived by him or by his assignee, nor is this privilege of the assignee affected by the death of his assignor. *Id.*

— *Who is, under 2 R. S., 406, § 73.*

*See EDINGTON v. ÆTNA LIFE INS. CO*..... 548

— *Declaration by, as to cause of death* — *in an action on a policy of insurance.*

*See MCNAIR v. NATIONAL LIFE INS. CO*..... 144

**PLACE OF TRIAL:**

*See VENUE.*

**PLEADING** — *Plaintiff described in pleading as executor instead of as administrator* — *amendment allowed at General Term.*]

1. In this action, brought upon a promissory note made and delivered to one Eliza R. Wightman, the complaint alleged her death, the admission of her will to probate, and the issue of letters testamentary to the plaintiff as sole executor. The answer denied the appointment of plaintiff as executor and the issue of letters testamentary to him. Upon the trial it appeared that no executor had been named in the will, and that letters of administration with the will annexed had been granted to the plaintiff and one Harriet E. Ackerley.

*Held*, that the error in the description of the representative character of the plaintiff was amendable, either before or after judgment, and that such amendment should be allowed by the General Term upon appeal.

*RISLEY v. WIGHTMAN*..... 168

PLEADING — *Continued.*

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2. — *Defect of parties—must be pleaded.*] That any defect of parties plaintiff, arising from the omission of the plaintiff to join his co-administratrix with him, was waived by the failure of the defendant to set up the defect in his answer. *Id.*

3. — *Action for an account—former action must be pleaded to be a bar.*] This action was brought by a judgment creditor of one Timothy Chapman, in behalf of himself and of all other creditors who might join therein, to compel the assignees of said Chapman to render an account. Upon a hearing before a referee the counsel for the defendants insisted that the action could not be maintained, for the reason that a former accounting had been had between the creditors of the said Chapman and the assignees.

*Held*, that such former proceedings should have been set up in the answer, and that, not having been pleaded, they could not be proved in bar of the present action. *DERBY v. YALE*..... 273

4. — *Not a bar unless judgment was entered.*] The referee had made his report in the former action and the same had been filed, but no judgment had been entered thereon. *Held*, that until a judgment had been entered the former action could not be pleaded as a bar to the present one. *Id.*

5. — *Receiver—appointment of, by officer of special jurisdiction—what allegation as to appointment sufficient.*] In an action brought by a receiver appointed in supplementary proceedings, the complaint alleged that, "by an order of determination, then duly made by Hon. John J. Armstrong, county judge for the county of Queens, the plaintiff was appointed receiver."

*Held*, that his appointment was sufficiently alleged, and that a demurrer, on the ground that the complaint did not show that he had legal capacity to sue, was properly overruled. *MANLEY, RECEIVER, ETC., v. RASSIGA*..... 268

6. — *Action to set aside contract because of fraud.*] In an action to set aside a contract for fraud, it is not necessary that the complaint should contain an offer to restore what has been received under it. It is only when relief against an illegal contract is sought, and a statute requires that an offer to do equity must be made, that such an offer is necessary.

*HAY v. HAY*..... 315

7. — *Action upon bond given by married woman—complaint in—what allegation it must contain.*] In an action against a married woman and her husband upon a bond executed by them, it is sufficient if the complaint allege the execution, and delivery thereof by the defendants to the plaintiff, and set forth a copy of the bond. It is not necessary that it should contain any allegation as to her separate property or business.

*BROOME v. TAYLOR*..... 341

8. — *Denial of right to prosecute action—assignment in bankruptcy not admissible under.*] The answer contained a general denial, and also denied that plaintiff was the proper or real party in interest, and alleged that he had no legal or equitable right to prosecute the action. *Held*, that under such answer the defendant could not prove an assignment of all the estate of the plaintiff to an assignee in bankruptcy, nor the schedule of his property.

*SAUNDERS v. CHAMBERLAIN*..... 568

9. — *Amendment on appeal.*] *Quære*, whether upon an appeal from a judgment of the Justices' Court the County Court has power to allow an amendment to the answer. *Id.*

— *Time in—allegations in pleading relate to time of commencement of the action.*

*See PORTER v. KINGSBURY*..... 33

— *Amendment of, on trial before a referee.*

*See SMITH v. RATHBUN*..... 47

— *Action of partition—allegations of complaint—non-compliance with Rule 78 of 1876—demurrer.*

*See MOFFATT v. McLAUGHLIN*..... 449

— *When frivolous.*

*See PARKINSON v. JACOBSON*..... 317

**PLEADING — Continued.**

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— *A note in order to have the effect of extending the time of payment of a past debt must be alleged to be negotiable — without such allegation answer stricken out as frivolous.*

*See* WEBSTER v. BAINBRIDGE ..... 180

**POLICEMAN** — *Power of, to arrest for violating city ordinance.*] A policeman has no authority to arrest, without a warrant, a person violating a city ordinance, unless expressly authorized so to do by the city charter, or unless such violation of the ordinance is accompanied by a breach of the peace.

HENNESSY v. CONNOLLY ..... 178

**POLICY OF INSURANCE:**

*See* INSURANCE.

**PRACTICE** — *Judgment based upon former judgment against defendant — reversal of such former judgment — effect thereof.*] 1. In an action brought to recover damages for a breach of a covenant of seizin the plaintiff, to prove the breach, put in evidence a judgment recovered by one Smith against the defendant establishing a lien in favor of Smith upon the property and a *lis pendens* filed at the commencement of that action. After a recovery of judgment by the plaintiff the judgment recovered by Smith was reversed, upon appeal, by the General Term.

Upon an appeal by the defendant from the judgment recovered by the plaintiff, and from an order denying a motion for a new trial, *held*, that a new trial should be granted upon payment by the defendant of the costs of the first trial and of this appeal, and of ten dollars costs of opposing the motion below.

SMITH v. FRANKFIELD ..... 489

2. — *Answer — return of, because of a defective verification — notice must point out defect.*] Where an answer is returned on the ground that the verification of the same is defective, the notice must point out specifically the particulars in which it is defective. SNAPE v. GILBERT ..... 494

3. — *Temporary injunction — when refused.*] Some seventeen years since the plaintiff, by a contract, became possessed of the rights and interests of the Albany and Vermont Railroad Company in its road-bed, which ran generally in the same direction, but at places two or three miles distant from plaintiff's road. At that time the plaintiff took up the tracks from a considerable portion of this route and ceased to use it, the road-bed being in most cases inclosed and used by the adjoining owners. Recently the defendant having acquired the rights and titles of some of the adjacent owners in and to the said road, entered upon the same and commenced to grade and lay tracks thereon, intending to operate the road when completed.

This action was brought by the plaintiff to restrain the defendant from so doing. *Held*, that it was not a proper case in which to grant a temporary injunction.

TROY AND BOSTON R. R. CO. v. BOSTON, HOOSAC TUNNEL AND W. R. R. CO. 60

4. — *Discontinuance — when it should not be allowed.*] After the evidence in a case has been agreed upon and submitted to the justice trying the same, and a motion to open the case and take further evidence has been denied by him, a discontinuance of the action should not be allowed.

CLEARWATER v. DECKER ..... 68

5. — *Pendency of former action — plea of — relates to time of commencement of suit in which it is interposed.*] On July 7, 1875, the plaintiff herein commenced an action against the defendants upon an undertaking given by them. A demurrer interposed by them was overruled at the Special Term, but sustained upon an appeal to the General Term; and on January 3, 1876, judgment was entered therein dismissing the complaint, with costs. On February 17, 1876, this action was commenced by the same plaintiff against the same defendants, upon the same cause of action. March 11, 1876, the plaintiff appealed, in the first action, from the decision of the General Term to the Court of Appeals. March seventeenth the defendants served an answer in this action, setting up as a defense that another action was pending between the same parties for the same cause of action.

**PRACTICE — Continued.**

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*Held*, that the plea referred to the time of the commencement of the action; that, at that time, the former action had been terminated by a final judgment upon the demurrer, and was no longer pending, and that the plea should, therefore, be overruled. *PORTER v. KINGSBURY* ..... 33

6. — *Remedy.*] *Semble*, that the defendant's remedy was to apply for a stay of proceedings in this action during the pendency of the appeal in the first. *Id.*

7. — *Supplementary proceedings — Code, § 292.*] In order to authorize the making of an order before execution returned, requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply the property to the satisfaction of the judgment, and has been refused. *FIRST NAT. BANK v. WILSON* ..... 233

8. — *Judgment on demurrer — order refusing, not appealable — Duty as to return of pleading.*] An order of the Special Term denying a motion for judgment on the ground of the frivolousness of a demurrer, is not appealable to the General Term. *SMITH v. RATHBUN* ..... 47

9. — *Amendments to pleadings — power of referee to allow.*] A referee has the same power to allow amendments as the court upon the trial of an action. Such amendments may be allowed either to meet an immaterial variance between the pleadings and the proof, or for any other purpose, provided it does not change substantially the cause of action or defense. *Id.*

10. — *Surprise — proof of, required.*] When a party claims to be taken by surprise, or misled to his prejudice, by the amendment, proof of such facts must be furnished; without such proof the variance will not be deemed material. *Id.*

11. — *When amendment to be allowed.*] A referee is not obliged to wait until all the evidence is introduced before allowing an amendment to cure a variance, but may permit such amendment to be made at the commencement of the trial, so as to make the pleadings conform to the evidence which the party proposes to introduce. *Id.*

12. — *Rights of defendant, if plaintiff's pleading be amended.*] Where a referee allows a plaintiff to amend his complaint by adding thereto allegations which do not substantially change the cause of action set forth therein, he cannot allow the defendant, who has theretofore answered, to interpose a demurrer thereto. *Id.*

13. — *Review by motion.*] Where a referee has allowed a defendant to serve a demurrer to a complaint so amended, the plaintiff is not confined to an appeal from the order of the referee, but may move at Special Term to have the demurrer stricken out. *Id.*

14. — *Rule 26.*] Rule 26 does not apply to such a case, and the plaintiff is not obliged to return the demurrer. *Id.*

15. — *Terms of amendment.*] Although the terms upon which an amendment is allowed rest in the discretion of the referee, yet if he impose terms which he has no authority to impose, it ceases to be a matter of discretion, and his mistake may be corrected. *Id.*

16. — *Plaintiff described in pleading as executor instead of as administrator — amendment allowed at General Term.*] In this action, brought upon a promissory note made and delivered to one Eliza R. Wightman, the complaint alleged her death, the admission of her will to probate, and the issue of letters testamentary to the plaintiff as sole executor. The answer denied the appointment of plaintiff as executor and the issue of letters testamentary to him. Upon the trial it appeared that no executor had been named in the will, and that letters of administration with the will annexed had been granted to the plaintiff and one Harriet E. Ackerley. *Held*, that the error in the description of the representative character of the plaintiff was amendable either before or after judgment, and that such amendment should be allowed by the General Term upon appeal. *RISLEY v. WIGHTMAN* ..... 163

17. — *Defect of parties — must be pleaded.*] That any defect of parties plaintiff, arising from the omission of the plaintiff to join his co-administra-

**PRACTICE — Continued.**

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trix with him, was waived by the failure of the defendant to set up the defect in his answer. *Id.*

18. — *Appeal from order — only one appeal therefrom, or from part thereof allowed.*] By an order of the Special Term, made upon an application for the confirmation of the report of a referee, two claims presented by one M. to the referee, and allowed by him, were disallowed. M. appealed from so much of the order as disallowed one of the said claims. Subsequently and after the decision of the said appeal, he brought this appeal from the portion of the order disallowing the second claim. *Held*, that his right to appeal from the order was exhausted by the first appeal, and that the second appeal could not be maintained. *THOMPSON v. TAYLOR*..... 201

19. — *Additional affidavits — cannot be read upon appeal.*] Affidavits, made after the making of an order at the Special Term, cannot be read upon the hearing at the General Term, even although all the parties to the appeal consent thereto. *Id.*

20. — *Appeal from a judgment entered on the report of a referee in the county court, not necessary to move for a new trial.*] Under the provisions of the Code of Civil Procedure an appeal will lie to the General Term from a judgment entered upon the report of a referee, in an action pending in a county court, upon a case and exceptions settled by such referee; and a prior motion for a new trial in the county court, upon the exceptions and the decision of the referee is no longer requisite. *KILMER v. O'BRIEN*..... 224

21. — *Action for account — former accounting must be pleaded, to be a bar to.*] This action was brought by a judgment creditor of one Timothy Chapman, in behalf of himself and of all other creditors who might join therein, to compel the assignees of said Chapman to render an account. Upon a hearing before a referee the counsel for the defendants insisted that the action could not be maintained, for the reason that a former accounting had been had between the creditors of the said Chapman and the assignees.

*Held*, that such former proceedings should have been set up in the answer, and that, not having been pleaded, they could not be proved in bar of the present action. *DERBY v. YALE*..... 278

22. — *Not a bar unless judgment was entered.*] The referee had made his report in the former action and the same had been filed, but no judgment had been entered thereon. *Held*, that until a judgment had been entered the former action could not be pleaded as a bar to the present one. *Id.*

23. — *"Stale demands" — power of court to refuse to enforce.*] Although, in former times, courts of equity have refused to enforce "stale demands," yet since the adoption of the Code prescribing limitations for both legal and equitable actions no court can refuse to entertain an action on account of the staleness of the demand, providing it to be brought within the time prescribed by the statute. *Id.*

24. — *Action brought by one creditor in behalf of himself and others — who bound by.*] Where an action is brought by some of the creditors of a debtor, in behalf of themselves and all others similarly situated who shall come in and contribute to the expenses of the action, none but the plaintiffs therein acquire any vested interest in such an action, or are bound thereby, until a final judgment has been entered therein. *Id.*

25. — *Bill of particulars — when ordered in action for conversion.*] The complaint in this action alleged that in or about the years 1876 and 1877, this plaintiff was the lawful owner of, and entitled to, the quiet and peaceable possession of certain goods, chattels and personal property, of the value of \$5,000, and that the same were wrongfully taken and carried away by the defendant herein and converted to his own use.

*Held*, that the action was a proper one in which to order a bill of particulars. *ROBINSON v. COMER*..... 291

26. — *New trial on ground of newly-discovered evidence — costs of former trial must be paid by applicant for.*] A new trial, on the ground of newly-discovered evidence, should only be granted upon condition that the party applying therefor shall pay the costs of the former trial. *COMSTOCK v. DYE*, 118

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27. — *Costs — taxation of.*] In an action of ejectment the plaintiff recovered upon the trial before a referee; a new trial was ordered by the General Term, costs to abide the event. On the second trial defendant obtained a verdict in his favor; a new trial was granted on the ground of newly-discovered evidence, on payment of \$150, costs and disbursements of the action, and ten dollars costs of the motion, after payment of which, a third trial was had and a verdict rendered in favor of plaintiff.

*Held*, that plaintiff was not entitled to tax costs for either the first or second trials, but only for the third. *PROVOST v. FARRELL*..... 308

28. — *Stenographer's fees.*] Fees paid to a stenographer and for preparation of maps cannot be taxed. *Id.*

29. — *Question arising upon trial — can only be reviewed upon a case settled — Form of judgment in replevin.*] No question, either of fact or of law, arising upon a trial — *e. g.*, an objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery — can be reviewed upon appeal, except upon a case made and settled according to the established practice. *MCLEAN v. COLE*..... 300

30. — *Joinder of causes of action.*] A joinder in one complaint of a cause of action, arising from duress and restraint exercised over plaintiff's ancestor in inducing him to execute a will, and of a cause of action arising from false representations made to plaintiff, by reason of which plaintiff waived all objections to the probate of such will, is proper. *HAY v. HAY*..... 315

31. — *Pro forma verdict.*] The directing a *pro forma* verdict at Circuit, and reserving the cause for further argument and consideration to be had on a motion made on the judge's minutes to set aside the verdict, and on hearing of such motion directing judgment in favor of the party entitled thereto, approved. *HALL v. HALL*..... 306

32. — *Attachment for contempt — when it should not be allowed.*] Where, on an application made in a civil proceeding for an attachment to punish a party for a failure to comply with an order of the court directing the payment by him of a sum of money, it appears that his failure to comply with it arises from his not having the money wherewith to do so, and it does not appear that he has disabled himself from paying, with intent to avoid complying with the order, the attachment should not issue.

*COCHRANE v. INGERSOLL*..... 368

33. — *Action — when it sounds in tort — reference.*] This action was brought by the receiver of an insolvent insurance company to recover dividends alleged to have been wrongfully paid to the defendant, a stockholder of the company, at a time when the corporation was insolvent, such payments having been made out of the capital and assets of the company and received by the defendant in fraud of the rights of the creditors of the company.

*Held*, on a motion to refer the action, on the ground that it involved the examination of a long account, that the action sounded in tort and could not be referred against the objection of either party. *WICKHAM v. FRAZER*, 431

34. — *Trustees of insolvent debtor — references of claim by — procedure on application for.*] In order to authorize a reference under sections 21 and 23 of 3 Revised Statutes (6th ed.), page 39, relating to references of claims by trustees of insolvent debtors, it must be shown that the party making the application has offered to agree upon a reference, and that the other party has refused or neglected to consent thereto; and the application must be made, not to the court upon motion but to the officer who appointed the trustees, or to a justice of the Supreme Court at chambers residing in the district, upon a notice of at least ten days.

*Quare*, whether under this statute a reference can be ordered in an action sounding in tort. *Id.*

35. — *Order of arrest — motion to vacate — denied with leave to renew — renewal of motion after judgment.*] November 20, 1869, an order for the arrest of the defendant was granted in this action, and on December 28, 1869, a motion to vacate the same was denied with leave to renew the motion on showing the amount secured by an attachment previously issued in the action.

**PRACTICE** — *Continued.*

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In 1872 the action was tried and judgment recovered by the plaintiff. In February, 1877, this motion was made to vacate the order of arrest.

*Held*, that it was properly denied, as the leave to renew was only given for a special purpose, and the right to renew was terminated by the entry of the judgment. *MILLS v. RODEWALD*. . . . . 489

36. — *Motion to send back a case to a referee for further findings — when denied.*] Upon an action for an order to send back a case to a referee for further findings, it appeared that he had already passed upon such questions by refusing to find as requested, and that in each case the party requesting the finding had duly excepted to his refusal so to find.

*Held*, that the motion was properly denied, as upon such a motion the Special Term was not authorized to look into the whole case and determine that the referee ought to decide questions presented to him differently from what he had already done. *PEOPLE v. BANK OF NORTH AMERICA*. . . . . 484

37. — *Action of partition — allegations of complaint — Rule 78 of 1876 — demurrer.*] In an action for partition, in which one of the defendants was an infant, the complaint alleged that the land therein described was the only real estate owned in common by the defendants. The defendant demurred on the ground that it was not averred that the lands described in the complaint were the only lands owned in common by the parties as required by Rule 78 of the Rules of 1876.

*Held*, that the demurrer was properly overruled; that if the allegation was defective, it was because of its uncertainty, and the remedy was by motion and not by demurrer. *MOFFATT v. McLAUGHLIN*. . . . . 449

38. — *"Adverse party" — meaning of.*] The term "adverse party," as used in section 848 of the Code, requiring notice of the entry of judgment, affirming the judgment appealed from, to be served upon the "adverse party" at least ten days before commencing an action upon the undertaking, means the parties to the original judgment by whom the appeal was taken.

*YATES v. BURCH*. . . . . 623

39. — *Discrepancies in answer to application for insurance — when proper to submit question to the jury.*] One question was: "Has the party had, during the last seven years, any severe sickness or disease; if so, state the particulars and the names of the attending physicians, or who was consulted and prescribed?" The answer in the first application was: "Has had nervous difficulty and diarrhoea; C. H. Carpenter, Geneva, N. Y.;" in the second it was "No." The court left it to the jury to determine whether or not the nervous difficulty or diarrhoea was, in fact, a severe sickness or disease. *Held*, that this was proper; that if the nervousness and diarrhoea were not, in fact, severe diseases, the discrepancy between the two answers was not material. *EDINGTON v. AETNA LIFE INS. CO.* . . . . . 548

40. — *Pleadings — denial of right to prosecute the action — assignment in bankruptcy not admissible under.*] An answer contained a general denial, and also denied that plaintiff was the proper or real party in interest, and alleged that he had no legal or equitable right to prosecute the action. *Held*, that under such answer the defendant could not prove an assignment of all the estate of the plaintiff to an assignee in bankruptcy, nor the schedule of his property. *SAUNDERS v. CHAMBERLAIN*. . . . . 568

41. — *Amendment on appeal.*] Whether upon an appeal from a judgment of the Justices' Court the County Court has power to allow an amendment to the answer. *Id.*

42. — *Verdict subject to opinion of court — when proper.*] Where exceptions are taken during the trial, the direction of a verdict, subject to the opinion of the court, is error. The consent thereto is a waiver of the exceptions. *BIDDLECOM v. NEWTON*. . . . . 583

— *Severance of causes of action — offer to allow judgment to be taken for one of several claims — effect of, on right to sever.*

*See BRADBURY v. WINTERBOTTOM*. . . . . 586

— *Order of arrest — neglect of party procuring, to enter judgment when it is in his power so to do — Code, § 288 — discharge by order under — vacating said order — effect of.*

*See SCHELLY v. ZINK*. . . . . 588

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- *Neglect of sheriff to enforce execution in replevin suit.*  
See *HOFFMAN v. CONNER*..... 541
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- *Usury — action by devisee of mortgagor, to set aside a mortgage on the ground of — plaintiff must first offer to pay the amount loaned to his ancestor.*  
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- *Reference — preliminary decision of referee, as to point submitted by consent — regularity of.*  
See *WILKINS v. BUCK*,..... 124
- *Demurrer to a portion of a pleading — Costs at Special Term — costs upon appeal to General Term — Code of Civil Procedure, §§ 1847-1849.*  
See *VAN GELDER v. VAN GELDER*..... 118
- *An action to recover for services rendered by a married woman must be brought by the husband — Mutual account — what proof of, required, in order to avoid statute of limitations.*  
See *CUCK v. QUACKENBUSH*..... 107
- *Striking out of complaint for refusal of party to produce paper on trial.*  
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- *Action in equity to remove a cloud on title — when not maintainable — Remedy by ejectment.*  
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- *What witness not competent to testify under § 399 of the Code of Procedure but under § 829 of the Code of Civil Procedure, its substitute.*  
See *RICHARDSON v. WARNER*..... 13
- *An action can be maintained in equity to annul a bond and mortgage procured by fraudulent representations.*  
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See *GALE v. N. Y. CENTRAL AND H. R. R. R. Co.*..... 1
- *Order of arrest — Rule 6 of 1874, requiring endorsement on — what a sufficient compliance with.*  
See *KOPELOWICH v. KERSBURG*..... 173
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See *BARBER v. STETTHEIMER*..... 198
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- *Witness — contradiction of, when allowed — Challenges — review of decision as to — evidence upon — Impression as to guilt — when it does not render a juror incompetent.*  
See *GREENFIELD v. PEOPLE*..... 242
- *Court of General Sessions — Absence of two justices — power of county judge to receive a verdict.*  
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— Settlement of issues — discretionary with court — order directing, is not appealable.

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— Action to foreclose mortgage — costs — error as to — how corrected.

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— Appeal by executor — security on — failure to apply for limitation of amount of, under Code § 339 — presumption of assets arising from.

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— Bankruptcy proceedings — when they are determined — when creditor may sue — right of surety to substitution in place of creditor whose claim he has paid.

See MILLER v. O'KAIN..... 594

— What must be done by a creditor before he can attack a fraudulent conveyance by a non-resident debtor.

See BALLOU v. JONES..... 620

**PRESUMPTION** — *That one is stockholder of a corporation.*] Where one has been shown to be a stockholder at the time of the organization of a company under chapter 40 of 1848, he will be presumed to continue to be one until the contrary is established. HERRIES v. WESLEY..... 492

— As to pleading the statute of limitations — not indulged in favor of wrong-doer.

See OUTHOUSE v. OUTHOUSE..... 130

— Letters-patent are presumed to have been regularly issued.

See PEOPLE v. STEPHENS..... 17

— Of assets applicable to the judgment appealed from — arising from failure of executor on appeal, to apply for limitation of amount of security on, under Code, § 339.

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**PRIMA FACIE EVIDENCE** — *The failure of an attorney to succeed in a law suit, is not prima facie evidence of his negligence or want of skill therein.*

See SEYMOUR v. CAGGER..... 29

**PRINCIPAL AND AGENT** — *Agent of insurance company — power of, to waive condition of policy of insurance.*] 1. The defendant issued to the plaintiff a policy of insurance upon a frame building owned by him, the policy providing that it should be void if any change or transfer in title or possession

PRINCIPAL AND AGENT — *Continued.*

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should take place without the consent of the company indorsed upon the policy, or if the interest of the assured, as owner, mortgagee, devisee, or otherwise, was not truly represented to the company and stated in the policy; it also provided that the use of general terms, or any thing less than a distinct, specific agreement, clearly expressed and indorsed on it, should not be construed as a waiver of any printed or written conditions.

The plaintiff sold the house and took back a purchase-money mortgage. The defendant's agent thereafter received the annual premium from and gave a receipt therefor to him, being aware of these facts and understanding that he intended to insure his interest as mortgagee.

*Held*, that in an action on the policy the jury might infer an agreement by the agent to insure plaintiff's interest as mortgagee, and a waiver of the requirement that the plaintiff's interest, as mortgagee, should be indorsed on the policy. *WHITED v. GERMANIA FIRE INS. CO.* ..... 191

2. — *Waiver by agent.*] The agent was authorized to solicit insurance, issue and renew policies, note the changing of title, and to collect and pay premiums.

*Held*, that this evidence justified the conclusion that the agent had authority to waive, and by his acts had waived the condition above referred to, and that plaintiff was entitled to recover. *Id.*

3. — *Owner of real estate — liability of, for acts of contractor in doing work upon it.*] The defendant made a contract with one Clynes by which the latter agreed to raise a house, belonging to the former, four feet. The contractor dug a trench in the sidewalk next to the house about two feet wide and of about the same depth and threw the earth upon the sidewalk. The excavation was left unguarded and the plaintiff fell into it and was injured. The defendant did not authorize the trench to be dug, nor did he know of its having been made until after the accident. Its digging was not necessary to the performance of the contract. *Held*, that the defendant was not liable.

The owner of real estate is not liable for acts of a contractor employed to do work upon it unless (1) the contractor is his employe, or (2) unless the work, as authorized by the contract, necessarily produced the injury, or (3) unless the injuries were occasioned by the omission of some duty imposed upon him.

*RYDER v. THOMAS.* ..... 296

4. — *Repairs to boat — liability of owner for — when credit given to captain.*] Plaintiff's intestate made repairs upon a canal boat owned by the defendant, in pursuance of orders received from the captain of the boat. Subsequently the captain paid to the plaintiff a portion of the bill and gave his note for the balance. The plaintiff, without returning the note, brought this action after its maturity against the defendant.

*Held*, that the acceptance of the note of the captain, without explanation, was sufficient to show that the credit was given to him, and not the owner, and that plaintiff could not recover. *WARNER v. MILLER.* ..... 354

5. — *Purchase by agent of demand against principal — upon what terms Court of Equity will set it aside.*] Thomas O'Grady and wife executed a bond and mortgage to one W., who thereafter assigned the same to a son of the said Thomas, who assigned it to one Doyle, who assigned it to the son's wife, the plaintiff herein. The last two assignments were without consideration. At the time of the purchase of the mortgage by the son, he was acting as confidential agent of his father. In an action to foreclose the mortgage, the referee held that the confidential relations existing between the father and son prevented the latter from purchasing the mortgage, and that the assignment to him was void.

*Held*, that this was error; that at law the assignment vested the legal title in the son, and that equity would not allow the title so acquired to be taken from his assignee except upon the payment of the amount expended in purchasing the same. *O'GRADY v. COE.* ..... 598

— *Contract for commissions on sales — construction of.*

*See RUSSELL v. CONSOLIDATED FRUIT JAR CO.* ..... 286

— *Drawing-room cars — liability, for acts of servants in cars, of railroad company hauling such cars under a contract with the car company.*

*See THORPE v. N. Y. C. AND H. R. R. CO.* ..... 70

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- *Agent of insurance company — contract for payment of — construction of.*  
*See* **HABN v. NORTH AMERICAN LIFE INS. CO.**..... 195
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- *Liability of county for negligence of county treasurer, in failing to serve notice to redeem tax sale.*  
*See* **DE GRAUW v. SUPERVISORS OF QUEENS COUNTY.**..... 381
- *Account stated — authority of officer of corporation to make — Account rendered — what necessary to constitute an account stated.*  
*See* **HARVEY v. WEST SIDE ELEVATED RAILWAY CO.**..... 392

**PRINCIPAL AND SURETY — Request by surety that creditor will foreclose mortgage — neglect to comply with — effect of.]** 1. The defendant being the owner of a bond and mortgage, dated September 28, 1869, for \$4,400, \$500 of principal being payable on January first of each year from date, assigned the same on September 26, 1872, guaranteeing that the security was sufficient for the payment of the amount thereof, and guaranteeing also the collection of the same. In January, 1873, several installments of principal being due and unpaid, the secretary of the plaintiff, who then held the bond and mortgage under such assignment and guarantee, wrote to the defendant in regard to it. The defendant called at the office and notified the secretary that he wanted the company to foreclose the said mortgage. The company neglected to foreclose the mortgage until October 13, 1875. In the meantime a frame dwelling, worth \$2,000, had burned down, and only \$700 of insurance was received thereon.

A deficiency having arisen upon the sale, for which it was sought to hold the defendant liable, *held*, that the act of the company in failing, for more than two years, to foreclose the mortgage, after defendant had requested it so to do, relieved him from all liability for the deficiency which had arisen.

**NORTHERN INS. CO. v. WRIGHT.**..... 166

2. — *Bankruptcy act — when proceedings are determined.]* Under the provisions of the bankrupt act prohibiting any creditor who has proved his debt or claim from maintaining any suit at law or in equity thereupon against the bankrupt, unless a "discharge has been refused or the proceedings have been determined without a discharge" the proceedings are not determined unless an order to that effect has been entered by the United States Court.

**MILLER v. O'KAIN.**..... 594

3. — *Rights of surety of bankrupt.]* If a creditor has proved his claim against the bankrupt, a surety for the bankrupt, who, after such proof thereof, pays the debt, occupies the position of the original creditor as to the enforcement of the claim by suit. *Id.*

— *Collector's bond — receiver of rents and profits, not appointed in an action thereon — Distinction between the lien created by a collector's bond and that of a mortgage.*

*See* **UPHAM v. PADDOCK**..... 571

— *Note — addition of word "security" to name of one joint maker — action, how brought thereon.*

*See* **HOYT v. MEAD**..... 327

**PROCESS — Voluntary appearance — when sufficient.]** 1. The want of process to bring a defendant into court may be waived by a voluntary appearance in the action; but to be effectual, such appearance must be with knowledge that there is an action pending and with a full intention to appear therein. **MERKEE v. CITY OF ROCHESTER.**..... 157

2. — *Presence in court — not.]* The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, unless he notify him that an action is pending against him and unless he fully understands the nature of the proceedings. *Id.*

— *Summons — service of, upon corporation — "managing agent" — who is.*

*See* **EMERSON v. AUBURN AND OWASCO LAKE R. R.**..... 150

**PROMISSORY NOTE**—*Addition of word "surety" to name of one joint maker — action how brought thereon.*] 1. Where two persons execute a note and one of them adds to his signature the word "surety" both are to be treated as makers of the note and may be joined as defendants in an action upon it; nor is the liability of the surety to the holder of the note affected by any equities existing between such surety and his co-defendant.

**HOYT v. MEAD** ..... 327

2. — *A note, in order to have the effect of extending the time of payment of a past debt, must be negotiable.*] In an action to recover for liquors sold to the defendant, the defendant set up that the plaintiff had accepted the defendant's promissory note for the amount due, whereby the time for the payment of the debt was extended, and that such note was not yet due.

*Held*, that as the answer did not allege that the note so accepted was a negotiable note, it was properly overruled as frivolous.

**WEBSTER v. BAINBRIDGE** ..... 180

3. — *Married woman — liability of, on — when her husband has entire control of her business.*] An action was brought to recover the amount of a promissory note made by the defendant, a married woman, who owned a farm of 330 acres, on which she lived with her husband. He had no property, but carried on the farm for her and bought and sold whatever he pleased, using her money by her consent. Every thing he bought became hers. The proceeds of the note, as soon as received, were given by her to her husband, and were not used by him for plaintiff's benefit or that of her separate estate.

*Held*, that the defendant was engaged in carrying on the business of farming through her husband, acting as her agent, and that she was liable for the amount of the note. **SMITH v. KENNEDY** ..... 9

4. — *Destruction by its maker of an outlawed note — measure of damages for — presumption as to pleading the statute of limitations.*] This action was brought by the plaintiff against her brother, for the conversion of a note given to her for money borrowed by him. After the lapse of more than six years from the maturity of the note, he asked her to let him see it, promising to return it. Having obtained possession of it, he threw it in the stove and burned it up. The justice at the Circuit charged, with reference to the amount of damages, that the plaintiff was entitled to recover the face of the note with interest; that, though outlawed, it constituted a moral obligation sufficient to uphold a new note or promise; that, although the defendant could have pleaded the statute of limitations in an action upon the note, yet being a wrong-doer, he was entitled to no presumptions in his favor.

*Held*, that the charge was correct. **OUTHOUSE v. OUTHOUSE** ..... 130

— *Where a note was given upon the signing of a contract for the sale of land — in an action upon the note the plaintiff must prove performance or tender of performance of the contract.*

*See* **HOAG v. PAER** ..... 95

— *Endorsements upon — taking note out of the statute of limitations — admissible, without proof of actual payment.*

*See* **RISLEY v. WIGHTMAN** ..... 163

— *Discount of, given by an officer of a corporation — violation of charter as to — what is.*

*See* **FISHER v. MURDOCK** ..... 435

— *Forgery of — when person signing it is estopped from denying its genuineness.*

*See* **MOSHER v. CARPENTER** ..... 602

— *The acceptance of, in payment of a bill — constitutes a payment of the bill as to third parties.*

*See* **DRAKE v. PORTER** ..... 658

**PROOF OF LOSS** — *On one of several policies of insurance in the same company, on the same property, payable to the same person, when sufficient for all.*

*See* **DAKIN v. LIV. AND LONDON AND GLOBE INS. CO.** ..... 122

**PROVISIONAL REMEDY** — *What is not, under Code of Civil Procedure, § 772.* An order authorizing a substituted or constructive service of a summons is not an order granting a provisional remedy, within the meaning of section 772 of the Code of Civil Procedure.

McCARTHY v. McCARTHY. . . . . 579

**PUBLIC NUISANCE** — *Complaint — alleging obstruction of highway — public nuisance — when an action to abate is maintainable.*

See VAN BRUNT v. AHEARN. . . . . 388

**PUBLIC OFFICER** — *Liability of, for neglect of official duty, to person injured thereby.* 1. The complaint in this action alleged that the defendant was the head of the department of buildings in the city of New York; that it was his duty to see that all unsafe buildings in said city were taken down or made secure, and that he was furnished with the means necessary to fulfill the said duty; that a building, known as No. 25 Duane street, was so injured by fire as to render it unsafe, and that defendant had notice of its condition; that the said building fell upon an adjoining building in which the plaintiff's intestate lawfully was and killed her, and asked judgment for damages against the defendant.

*Held*, that a demurrer to the complaint, on the ground that it did not state facts sufficient to constitute a cause of action, should be overruled.

CONNORS v. ADAMS. . . . . 427

2. — *Action against — where triable.* The warden of the city prison in New York is a public officer, and an action brought to recover damages for an act done by him in virtue of his office, must be tried in the county of New York. COWEN v. QUINN. . . . . 344

**PUBLIC POLICY** — *Assignment of policy of insurance on life — with right to redeem — such right to expire on death of insured — valid.*

See EDINGTON v. ÆTNA LIFE INS. CO. . . . . 543

**PURCHASER:**

See VENDOR AND PURCHASER.

**PURPRESTURE** — *Commissioners of highways — power of, to enjoin purpresture.* The commissioners of highways of a town have no power to bring an action to enjoin the construction of a permanent obstruction in the highway. COYKENDALL v. DURKEE. . . . . 260

— *Order laying out highway — record of, how impeached — The survey — must be incorporated into the order.*

See PRATT v. PEOPLE. . . . . 664

**RAILROAD** — *Application for change of route — chap. 140 of 1850, and chap. 560 of 1871 — the notice — must be personally served.* 1. The notice required by the statute (§ 22 of chap. 140 of 1850, as amended by chap. 560 of 1871) to be given on an application for a change of the proposed route of a railroad company, must be personally served.

*Quare*, whether, in a case where personal service is impracticable, the court would have power, under the seventh subdivision of section 14, to direct service to be made in some other mode.

PEOPLE EX REL. N. B. AND C. R. R. CO. v. L. AND B. R. R. CO. . . . . 211

2. — *Fire started by sparks from engine.* In an action to recover damages for the burning of woodland, by a fire started by the negligence of a railroad company in allowing sparks and coals to escape from its engines, the plaintiff is not required to prove which one of the defendant's engines set the fire. BEVIER v. DELAWARE AND HUDSON CANAL CO. . . . . 254

3. — *Identification of engine.* Where he is unable to identify the engine that set the fire, by name or number, or by any other designation, if he prove either by the manner in which it was operated or by the extent to which it scattered fire that it was so far out of repair as to charge the company with negligence, it is sufficient. *Id.*

4. — *Duty of railroad as to condition of engine.* The counsel for the defendant requested the court to charge that the defendants were not bound

**RAILROAD — Continued.**

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to use any other appliances than such as are known in practical use. The court so charged, adding, "that is, the known and recognized means for preventing the escape of sparks from a locomotive, and such as are best adapted to that purpose." *Held*, that the qualification added by the court was proper. *Id.*

5. — *Putting out fire.*] The court charged that the plaintiff was not bound to use extraordinary means to extinguish or prevent the spread of the fire. *Held*, that this was proper. *Id.*

6. — *Contributory negligence.*] The defendant's counsel requested the court to charge that, if the plaintiff allowed dry limbs, brush, grass and other combustible matter to lie and accumulate on his premises adjacent to the line of the railroad, and that if such accumulation contributed to produce the fire, by means of which the premises were burned over, he was not entitled to recover. *Held*, that the request was properly refused; that, whether or not the plaintiff had been guilty of negligence contributing to the injury, was a question for the jury; it was not the province of the court to instruct the jury that certain specified acts or omissions constitute negligence. *Id.*

7. — *Contract for carrying goods — when not confined to goods shipped on shipper's own account.*] The plaintiff, a resident of Chicago, entered into a contract with the defendant whereby the latter agreed to carry and transport from New York to Liverpool such merchandise, not exceeding a specified amount, as might be furnished by the plaintiff, during certain months, at a specified price. A portion of this merchandise was shipped by the plaintiff on his own account, and the remainder thereof was furnished by other persons, who made a contract with the plaintiff for its transportation. The bills of lading were made out at Chicago, the defendant receiving the goods at New York, paying the back freight and collecting the whole amount of freight from the assignees at Liverpool. After the making of the contract between plaintiff and defendant ocean freights increased, so that, as the bills of lading made at Chicago charged for freights at the current rates, those being the rates agreed upon between plaintiff and the parties furnishing the merchandise to him for transportation, the amount received by the defendant at Liverpool for the ocean freights exceeded the amount which, by the terms of his contract, was to be charged to the plaintiff. In an action by the plaintiff to recover this excess over the contract rates, which had been received by the defendant, *held*, that he was entitled to recover.

TUGMAN v. NATIONAL STEAMSHIP CO. .... 333

8. — *Taking land for purposes of — compensation to landowners.*] Under an act of the legislature certain land was taken to be used as a highway; one section of the act gave a license to a railroad company to lay their track thereon and use the same. This license was subsequently declared invalid, because no compensation was made to the owners for the additional burden thereby imposed upon their lots.

In a proceeding instituted by the company to acquire title to the land under the general railroad act, *held*, that the commissioners to appraise damages should regard the land in the avenue as still forming a part of the parcels to which it had belonged, but subject to the easement of a highway, and should award as damages the difference between the market value of the whole property from which the railroad was to be severed, before the taking, and its value after the taking, with the railroad upon the land taken.

MATTER OF PROSPECT PARK AND CONEY ISLAND R. R. Co. .... 345

9. — *Tickets issued by — right of passenger to stop over.*] On February seventeenth plaintiff purchased from defendant at Patchogue an excursion ticket to Brooklyn, which stated, "Good until three days after date. Excursion ticket," and on the same rode to Brooklyn. On the following day he took a train from Brooklyn which arrived at Babylon late at night and did not connect with any train for Patchogue. He drove to the next station east, remained there over night and in the morning took a train for Patchogue, from which he was ejected by the conductor, in compliance with a regulation of the company providing that stop-over checks should not be given on excursion tickets.

*Held*, that the company were authorized to remove him, and that he was not entitled to recover, no unnecessary violence having been used.

**RAILROAD — Continued.**

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That plaintiff, under his contract with the company, could only demand a continuous passage, and had no right to stop over at intermediate points.

TERRY v. FLUSHING, N. S. AND C. R. R. Co. .... 360

10. — *Drawing-room cars — liability of railroad company drawing cars under contract with car company.*] The defendant entered into a contract with Webster Wagner, by which Wagner agreed to place upon defendant's road certain drawing-room cars at his own cost and keep the interiors thereof in good order, Wagner's conductors and porters thereon to be carried free of charge by the railroad company. The defendant's conductors had a right to enter the cars for any purpose connected with the management of the train, and for the collection of fares, and to the assistance of Wagner's conductors and porters in enforcing good order; but not otherwise to interfere with the business of such cars. In consideration of the railroad company hauling and making certain repairs to the cars, Wagner agreed to pay it twenty per cent of the gross receipts.

In an action brought by the plaintiff against this defendant the railroad company, to recover for injuries sustained by reason of his alleged wrongful removal from the drawing-room car by the porter thereof, *held*, that the defendant was liable for any injuries so sustained by him.

THORPE v. N. Y. CENTRAL AND H. R. R. R. Co. .... 70

11. — *Duty of one passing over railroad crossing — action for negligence.*] The plaintiff's intestate was struck by one of defendant's engines and killed, while driving a team of horses across one of its tracks. Upon the trial counsel for the defendant requested the court to charge that it was negligence on the part of the intestate, if he approached the crossing at such a rate of speed as to be unable to stop or turn his horses aside before going on to the track. The court charged, "that if the intestate approached the track at such speed that he was unable to control or stop his team, without making any effort to apprehend the approach of the train," he was guilty of negligence.

*Held*, that the charge as requested was properly refused, and that as modified it was as favorable to defendant as it was entitled to, except that it was the duty of the plaintiff's intestate to make such effort as was reasonable under the circumstances to ascertain if a train was approaching.

SALTER v. UTICA AND BLACK RIVER R. R. Co. .... 187

12. *Proceedings for bonding towns in aid of — commissioners to issue bonds — annulling of proceedings — effect of, on powers of commissioners.*] On July 1, 1871, the county judge of Jefferson county, in proceedings instituted before him, under chapter 907 of 1869 and chapter 925 of 1871, appointed commissioners to issue bonds in aid of the construction of a railroad. The proceedings were removed by *certiorari* to this court, and on July 1, 1872, a judgment was entered affirming them. On February 24, 1873, the Court of Appeals reversed the judgment and directed the county judge to dismiss the application. After the issuing of the *certiorari*, the commissioners issued bonds to the amount of \$90,000 and delivered them to the plaintiff, the agent and treasurer of the railroad company, who delivered in exchange therefor the stock of the company. Both the plaintiff and the commissioners knew of the pendency of the *certiorari*. The money necessary to pay the interest on the bonds for a certain time had been levied and received by the collector. In this action brought to recover the amount of certain coupons attached to the bonds, the money to pay which had been collected, the plaintiff produced an instrument signed by the persons appointed commissioners, reciting their appointment, and the fact that the proceedings had been declared void, and transferring to plaintiff all their right to the bonds as commissioners or otherwise.

*Held*, that the money having been collected for the specific purpose of paying the coupons, that if it was the duty of the defendant to pay it over to the holders of the coupons, he could not set up the invalidity and reversal of the proceedings before the county judge as a reason for not doing so.

That it was, in fact, his duty to pay the commissioners, and not the holders of the coupons.

That the commissioners had no right to, or interest in the fund except as

**RAILROAD — Continued.**

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commissioners, and while continuing to hold the office, and that they could not transfer their official rights or divest themselves of their official duty.

That immediately upon the decision of the Court of Appeals, they ceased to be such commissioners and to have any interest whatever in the fund.

That nothing passed to the plaintiff by the pretended transfer, and that plaintiff could not recover. *BIDDLECOM v. NEWTON*..... 582

— *Negligence — turning cows on to highway crossed by railroad track.*

*See FITCH v. BUFFALO, N. Y. AND PHIL. RY. CO.*..... 668

— *Injuries occasioned by — Contributory negligence — when a question for the jury.*

*See HOFFMAN v. N. Y. CENTRAL AND H. R. R. R. CO.*..... 589

— *When question of contributory negligence should be submitted to the jury.*

*See FLOPPER v. N. Y. C. AND H. R. R. R. CO.*..... 625

— *Right of to remove rails — laid on land under a parol agreement.*

*See CAYUGA RAILWAY CO. v. NILES*..... 170

— *Notice of lien by laborers and material-men against — what must be shown to establish lien — chap. 402 of 1854, and chap. 529 of 1870.*

*See SAMPSON v. BUFFALO, N. Y. AND P. R. CO.*..... 290

— *Negligence in order to create liability, must contribute to or cause the accident.*

*See COSGROVE v. N. Y. CENTRAL AND H. R. R. R. CO.*..... 339

**RAPE — Assault with intent to commit — what should be alleged in the indictment — consent of a child under ten years of age does not alter the crime.**

*See SINGER v. PEOPLE*..... 418

**REAL PROPERTY — Purchase of, by trustees of savings bank — when unauthorized.]** 1. A savings bank in New York was incorporated in 1867.

During the years 1861, 1868 and 1869 the expenditures exceeded the receipts; in 1870 and 1871 the receipts were in excess of the expenditures, and in 1872 and 1873 the expenditures again exceeded the receipts. In the latter year the trustees of the bank purchased four lots, three of which were sold, and on the fourth a banking-house was erected. This action was brought by a receiver of the bank against the trustees to recover damages alleged to have been sustained by the bank from such purchase, on the ground that, as the charter limited the power of the trustees to purchase real estate to a lot and banking-house, that the purchase of the four lots by the trustees when they needed but one, and the purchase of even one lot in the then condition of the bank, was an abuse of discretion, and illegal and unauthorized.

*Held*, that the question as to whether or not the purchase of the land, considering the financial condition of the bank, was a reasonable exercise of the discretion vested in the trustees, was a question for the jury, and that it was error for the court to withdraw that question from them.

*FRENCH v. REDMAN*..... 502

2. *Partnership for purchase of — oral agreement for — liability of partners.]* Dobbs, Raynor and Gillies agreed, orally, that Dobbs should purchase certain real estate in his own name and give back a mortgage thereon for part of the purchase-money; the real estate to be held for speculative purposes and sold for the joint benefit of all; the profits to be divided among them in proportion to the amount contributed by each. Dobbs accordingly purchased the property and gave back a mortgage to plaintiff's testator, who was at the time ignorant of the partnership. In an action to foreclose the mortgage the judgment directed that each of the partners should be liable for such proportion of any deficiency that might arise upon the sale as corresponded to his interest in the land.

*Held*, that this was as favorable a judgment for the partners as they were entitled to; that under such circumstances the name of the partner, used in the transaction, becomes *pro hac vice* the partnership name.

*WILLIAMS v. GILLIES*..... 492

3. — *Agreement not under seal to convey lands — Covenant to stand seised — what consideration must exist for — When a contract is not enforceable by a*



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*stranger to the consideration thereof.*] One Lydia J. Noyes, who was the owner of a farm, entered into an agreement with her husband, by which she agreed that her husband should have the use of the farm during his life; that upon his death, if she was then living, she should have the use of it for her life; and after the death of both, she agreed that one Malvina Noyes, the child of her husband by a former wife, should have all the right and title of the said Lydia therein "in consideration of \$200, in hand paid." The agreement was not sealed.

*Held*, that the instrument purported to be a contract between husband and wife, and was void at law.

That as it was not sealed it could not operate either as a conveyance or a covenant to stand seized.

That, even if it were sealed, it could not operate as a covenant to stand seized for the benefit of Malvina, as it was not founded on a consideration of blood or marriage, and she being a stranger to any pecuniary consideration therein mentioned, could not take advantage of or enforce it.

*LOSSEE v. ELLIS*..... 685

4. — *Covenants of indemnity and covenants to perform specific acts — distinction between — Measure of damages upon loss of household interest — evidence as to.*] Plaintiff and defendant's intestate entered into an agreement whereby the latter agreed, in consideration of a sum of money paid to him by plaintiff, to procure the discontinuance of two foreclosure actions then pending, and to purchase certain mortgages and hold them until the expiration of a lease, owned by plaintiff, of the mortgaged premises, so that she might enjoy the use of the same during the term of the lease. The intestate having failed to purchase, two of the mortgages were foreclosed, and just as the premises were to be sold, the plaintiff sold out her lease for \$625. The lease had then two years and three months to run, and all the rent, except for one year, had been paid in advance at the rate of \$500 a year.

In an action to recover damages for a breach of the agreement, *held*, that the plaintiff was not bound to wait for an actual eviction, but that the agreement was broken as soon as the intestate failed to perform the specific acts required by the agreement, viz., to purchase and hold the mortgages.

That she was entitled to recover as damages the actual value of the premises for the unexpired term of the lease after deducting therefrom the rent to be paid.

*Held*, further, that in determining the value of the use of the premises the referee was not confined to the receipts from and the expenditures upon them.

The distinction between a covenant of indemnity and a covenant to do a specific act, discussed. *HAWKINS v. MOSHER*..... 563

— *When legacies are charged upon land.*

*See STODDARD v. JOHNSON*..... 606

— *Fraudulent conveyance by non-resident debtor — what must be done by creditor before he can attach it.*

*See BALLOU v. JONES*..... 629

— *Acquisition of fee of land by city for sea-wall — uses to which it may apply it.*

*See SWEET v. BUFFALO, N. Y. AND PHIL. RY. CO.*..... 648

— *Easement of — right of drainage — what words are sufficient to create.*

*See FLINT v. BACON*..... 454

— *Boundary line — when it can be established by parol.*

*See AMBLER v. COX*..... 295

— *Owner of — liability of, for acts of contractor in doing work upon it.*

*See RYDER v. THOMAS*..... 296

— *Parol agreement as to — easement cannot be created by — not to be performed under one year — when it enures as a license.*

*See CAYUGA RAILWAY CO. v. NILES*..... 170

— *Cloud upon title to — action in equity to remove — when not maintainable — Remedy by ejectment.*

*See BOOKER v. LANSING*..... 88

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- *Contract for sale of lands — note given upon signing contract — in an action upon the note plaintiff must prove performance of the contract or tender.*  
*See* HOAG v. PAER..... 95
- *Right of way — right of the owner of the easement to repair the way.*  
*See* McMILLAN v. CRONIN..... 68
- *Animals trespassing upon — right of owner of land to drive them off with dogs.*  
*See* SMITH v. WALDORF..... 127
- *Estoppel — must be certain — effect of, when part of description of real property — it does not apply to collateral actions — declarations of persons in possession of land — when admissible.*  
*See* EDMONSTON v. EDMONSTON..... 133
- *Taking land for railroad purposes — compensation to landowners.*  
*See* MATTER OF PROSPECT PARK AND CONEY ISLAND R. R. CO..... 345
- *Title to — how affected by conveyance by married woman under chapter 90 of 1880 — without consent of her husband — when consent may be given.*  
*See* WING v. SCHRAMM..... 377
- *Of infant — sale of — mortgage given by purchaser — want of title in infant no defense to.*  
*See* PARKINSON v. JACOBSON..... 317

**REBUTING TESTIMONY — What admissible to rebut testimony impeaching the character of a witness.**

*See* HAGADORN v. KEARNEY..... 236

**RECEIVER — Appointment of, by officer of special jurisdiction — what allegation as to appointment sufficient.]** 1. In an action brought by a receiver appointed in supplementary proceedings, the complaint alleged that, "by an order of determination, then duly made by Hon. John J. Armstrong, county judge for the county of Queens, the plaintiff was appointed receiver."

*Held*, that his appointment was sufficiently alleged, and that a demurrer, on the ground that the complaint did not show that he had legal capacity to sue, was properly overruled. *MANLEY, RECEIVER, v. RASSIGA*..... 288

2. — *Of insolvent insurance company — not entitled to security deposited with superintendent of insurance department — chapter 463 of 1853.]* A receiver of an insolvent insurance company, appointed under chapter 463 of the Laws of 1853, is not entitled to have transferred to him the securities deposited by the company with the superintendent of the insurance department.

*MATTER OF GUARDIAN MUTUAL LIFE INS. CO*..... 115

— *Of a partnership — marshalling of assets of — Bond signed by partners individually — when it constitutes a firm obligation.*

*See* BERKSHIRE WOOLEN CO. v. JULLARD..... 507

— *Of rents, etc., of mortgaged premises — what persons in possession may object to his appointment.*

*See* SMITH v. TIFFANY..... 672

— *Of rents and profits — not appointed in action on collector's bond — distinction between the lien created by collector's bond and that of a mortgage.*

*See* UPHAM v. PADDOCK..... 571

**RECORDING ACTS — Assignment — latent defect in acknowledgment — effect of — Discharge of mortgage by mortgagee, after assignment of.]** In March, 1873, one R. was the owner of premises subject to a mortgage for \$3,000 held by one Aymar. R. desiring to raise more money, a mortgage for \$7,000 was executed to one Pardee, dated March 25, 1873, and recorded April 4, 1873, but Pardee having refused to make the loan the plaintiff agreed to advance the money and took an assignment of the mortgage from Pardee, dated April 16, 1873, and recorded April 17, 1873. The acknowledgment to this assignment, though regular upon its face was, in fact, taken by a notary public of New York county out of his county, to wit, in the State of New Jersey. Subsequently Aymar desiring to have his money a search was made by the Seaman's Savings Bank, which had agreed to furnish the money, and the Pardee mortgage discovered; thereafter by an arrangement between Pardee

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and R. the former executed a satisfaction-piece of the mortgage and an entry was made by the Register to the effect that the same was discharged of record; the assignment to the plaintiff being then on record. Subsequently another mortgage was given upon the premises and the same was thereafter assigned to defendant H. In an action to foreclose plaintiff's mortgage it was claimed that the acknowledgment to the assignment from Pardee to plaintiff was void and its record was not notice to subsequent mortgagees.

*Held*, that the plaintiff having acquired title to the mortgage which was recorded, and the assignment and certificate of acknowledgment being in due form and recorded, notice was thereby given to all subsequent purchasers or mortgagees that he was the owner thereof, and his rights were not affected by the discharge of the mortgage by the Register.

That the recording of the assignment to plaintiff, as a *notice to subsequent mortgagees*, was not invalidated by proof that the acknowledgment was taken in New Jersey by a notary public of New York county, when his certificate was in due form and purported to have been taken in New York.

HEILBRUN v. HAMMOND ..... 474

— *Recording — of mortgage given to secure future advances — advances made after attaching of subsequent liens, are subject thereto.*

See HALL v. OROUSE ..... 557

**RECOVERY — On insurance policy — by mortgagees to whom loss is payable — mortgagees entitled to recover the entire amount though in excess of his individual loss.**

DAKIN v. LIV. AND LOND. AND GLOBE INS. CO. .... 128

**REFEREE — Amendment on trial before.]** 1. A referee has the same power to allow amendments as the court upon the trial of an action.

Such amendments may be allowed either to meet an immaterial variance between the pleadings and the proof, or for any other purpose provided it does not change substantially the cause of action or defense.

SMITH v. RATHBUN ..... 47

2. — *Surprise — proof of, required.]* When a party claims to be taken by surprise, or misled to his prejudice, by the amendment, proof of such facts must be furnished; without such proof the variance will not be deemed material. *Id.*

3. — *When amendment may be allowed.]* A referee is not obliged to wait until all the evidence is introduced before allowing an amendment to cure a variance, but may permit such amendment to be made at the commencement of the trial, so as to make the pleadings conform to the evidence which the party proposes to introduce. *Id.*

4. — *Rights of defendant if plaintiff's pleading be amended.]* Where a referee allows a plaintiff to amend his complaint by adding thereto allegations which do not substantially change the cause of action set forth therein, he cannot allow the defendant, who has theretofore answered, to interpose a demurrer thereto. *Id.*

5. — *Review on motion.]* Where a referee has allowed a defendant to serve a demurrer to a complaint so amended, the plaintiff is not confined to an appeal from the order of the referee, but may move at Special Term to have the demurrer stricken out. *Id.*

6. — *Rule 26.]* Rule 26 does not apply to such a case, and the plaintiff is not obliged to return the demurrer. *Id.*

7. — *Terms of amendment.]* Although the terms upon which an amendment is allowed rest in the discretion of the referee, yet if he impose terms which he has no authority to impose, it ceases to be a matter of discretion, and his mistake may be corrected. *Id.*

8. — *Action — when it sounds in tort — reference.]* This action was brought by the receiver of an insolvent insurance company to recover dividends alleged to have been wrongfully paid to the defendant, a stockholder of the company, at a time when the corporation was insolvent, such payments having been made out of the capital and assets of the company and received by the defendant in fraud of the rights of the creditors of the company.

*Held*, on a motion to refer the action, on the ground that it involved the

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examination of a long account, that the action sounded in tort and could not be referred against the objection of either party. *WICKHAM v. FRAZEE*.. 431

9. — *Trustees of insolvent debtor—references of claim by—procedure on application for.*] In order to authorize a reference under sections 21 and 22 of 3 Revised Statutes (8th ed.), page 39, relating to references of claims by trustees of insolvent debtors, it must be shown that the party making the application has offered to agree upon a reference, and that the other party has refused or neglected to consent thereto; and the application must be made, not to the court upon motion, but to the officer who appointed the trustees, or to a justice of the Supreme Court at Chambers residing in the district, upon a notice of at least ten days.

*Quære*, whether under this statute a reference can be ordered in an action sounding in tort. *Id.*

10. — *Error of, as to cost in action to foreclose mortgage—how corrected.*] In an action to foreclose a mortgage the costs are in the discretion of the court. Where a referee in such a case decides that the plaintiff is only entitled to certain costs, his error, if any, can only be corrected by an appeal from the judgment, and not upon a motion. *LOSSEE v. ELLIS*..... 656

— *Preliminary decision of referee, as to point submitted by consent—regularity of.*

*See WILKINS v. BUCK*..... 124

— *Motion to send back a case to, for further findings—when denied.*

*See PEOPLE v. BANK OF NORTH AMERICA*..... 434

**RENTS AND PROFITS—Receiver of—not appointed in an action on a collector's bond—distinction between the lien created by a collector's bond and those of a mortgage.**

*See UPHAM v. PADDOCK*..... 571

**REPLEVIN—Levy by sheriff—when sufficient to sustain replevin or action for conversion.**] 1. A sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife.

*Held*, that the act of the sheriff in levying upon the property was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property.

*ALVORD v. HAYNES*..... 26

2. — *Liability of sheriff, although the interest sold amounted to nothing.*] That his liability was not affected by the fact that he claimed to levy upon, and advertised for sale the interest of the husband alone, when the husband had, in fact, no interest therein. *Id.*

3. — *Plaintiff in judgment—when responsible for acts of sheriff.*] The facts that the plaintiff, in the judgment, directed the sheriff to get the executions, and consulted and advised with him and approved of his making the levy, are sufficient to sustain a verdict against him. *Id.*

4. — *Form of judgment in.*] An objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery, can only be reviewed upon appeal, upon a case made and settled according to the established practice. *MCLEAN v. COLE*.. 300

— *Suit—neglect of sheriff to enforce execution in.*

*See HOFFMAN v. CONNER*..... 541

**REPRESENTATIONS:**

*See FRAUDULENT REPRESENTATIONS.*

**RES GESTÆ—Evidences—what statements do not constitute part of.**] This action was brought to recover the amount alleged to be due to the plaintiff upon a sale of certain real estate made by his assignor to the defendant. Upon the trial the person who drew the deed was called as a witness and stated, against the defendant's objection and exception, that the grantor, at the time he was executing the deed (the grantee not being present) stated to the witness that the purchase-price had not been paid, but that the grantee had promised to pay it whenever he should be requested so to do.

*Held*, that the statement did not constitute a part of the *res gesta*, and should have been excluded. *TRIMMER v. TRIMMER*..... 189

**RESIDUARY LEGATEE** — *Liability of, for payment of legacies — when they are charged upon land.*] A testator, by his will, bequeathed certain specific pecuniary legacies to persons therein named, and then proceeded "after the payment of my funeral expenses, the payment of my just debts and the payment of the legacies aforesaid, I give, devise, and bequeath unto my son, William Johnson, all the rest and residue of my estate, real and personal, wherever the same may be situated." *Held*, that the legacies were charged upon the real estate, and the residuary legatee, by taking possession thereof under and by virtue of the will, became personally liable for the payment of the legacies without any express promise by him. *STODDARD v. JOHNSON*... 606

**RETURN** — *By justice of the peace to County Court — truthfulness of, cannot be questioned — remedy for false return.*

*See BARBER v. STETTMEIER* ..... 198

— *Of answer because of a defective verification — notice must point out defect.*

*See SNAPE v. GILBERT* ..... 494

— *Refusal of canal appraisers to make return to canal board — mandamus proper mode of compelling.*

*See PEOPLE EX REL FREER v. CANAL APPRAISERS* ..... 64

**REVERSAL** — *Of judgment — effect of, on subsequent judgment based therein.*

*See SMITH v. FRANKFIELD* ..... 498

**REVISED STATUTES** — 2 R. S., 98, §§ 82, 83 — *Application for a portion of a legacy for the support of the legatee — what must be shown to authorize the order — Bond — form of.*

*See BARNES v. BARNES* ..... 288

— 2 R. S., 406, § 73 — *who is attending physician under — he is prohibited from disclosing information acquired by him in attending a patient professionally.*

*See EDINGTON v. AETNA LIFE INS. CO.* ..... 548

— 3 R. S. (6th ed.), 39, §§ 21, 22 — *Reference.*] In order to authorize a reference under sections 21 and 22 of 3 Revised Statutes (6th ed.), page 39, relating to references of claims by trustees of insolvent debtors, it must be shown that the party making the application has offered to agree upon a reference, and that the other party has refused or neglected to consent thereto; and the application must be made, not to the court upon motion, but to the officer who appointed the trustees, or to a justice of the Supreme Court, at Chambers, residing in the district, upon a notice of at least ten days.

*Quære*, whether under this statute a reference can be ordered in an action sounding in tort. *WICKHAM v. FRAZER* ..... 481

**RIGHT OF WAY** — *Right of the owner of the easement to repair the way.*] Where one has a right of way over the lands of another, he may do whatever is suitable and proper to put the said way in good order, provided it be done without unnecessary inconvenience to the owner of the fee.

*McMILLEN v. CRONIN* ..... 68

**ROCHESTER** — *Common council of — power of, over fire department.*] 1. A committee of the common council of the city of Rochester directed the fire department of the city to assemble in front of the city hall, at midnight, on the 31st of December, 1875, to celebrate the incoming of the centennial year. This action was brought to recover damages for injuries sustained by plaintiff who was struck by one of the hose carts through the negligence of the driver.

*Held*, that the common council had no authority to direct the fire department to so assemble, and the city was not responsible for injuries occasioned thereby. *SMITH v. CITY OF ROCHESTER* ..... 214

2. — *Liability of city for negligence of a member of the fire department.*] That even if the common council had authority to so direct, yet the city would not be liable for the negligence of a member of the fire department

**ROCHESTER — Continued.**

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while engaged in the performance of his legitimate duty as such, whether in exercising, as directed by the common council, or in endeavoring to prevent or extinguish a fire. *Id.*

8. — *Violation of city ordinance — imprisonment for.*] By the charter of the city of Rochester the police justice thereof has jurisdiction in suits brought for a violation of any of the city ordinances, and is authorized to enter a judgment commanding a penalty, recovered for a violation of said ordinances, to be made of the goods and chattels of the defendant, if such can be found; and if not, then to commit the defendant to the county jail for such time as shall have been directed by the common council, unless otherwise provided by the charter. The plaintiff having been adjudged guilty of a violation of one of the city ordinances, was sentenced to pay fifty dollars, or, in default thereof, to be imprisoned in the Monroe county penitentiary for ninety days.

*Held*, that the judgment was void, (1) because it did not appear that the common council had made any direction as to the length of time for which persons found guilty of violating city ordinances should be imprisoned, and (2) because the charter authorized an imprisonment in the county jail only, and not in the county penitentiary. *MERKEE v. CITY OF ROCHESTER*. . . . . 157

**RULE — 6 — of 1874 — Order of arrest — what a sufficient compliance with.]**

1. It is a sufficient compliance with Rule 6 of the Rules of 1874, requiring the sheriff to file with the clerk the order of arrest and affidavits on which it was granted and directing that a copy of the rule be indorsed on the order of arrest before its delivery to the sheriff, if the substance of the rule be indorsed upon the outside of the original papers given to the sheriff, although such indorsement be omitted from the copy of the papers served upon the person arrested. *KOPELOWICH v. KERSBURG*. . . . . 178

2. — 26 — *To what case not applicable.*] Where a referee has allowed a defendant to serve a demurrer to a complaint which has been allowed to be amended by him on the trial, the plaintiff is not confined to an appeal from the order of the referee, but may move at Special Term to have the demurrer stricken out. Rule 26 does not apply to such a case, and the plaintiff is not obliged to return the demurrer. *SMITH v. RATHBUN*. . . . . 48

**SALE — Of infant's real estate — mortgage given by purchaser — want of title in infant — no defense to.]**

1. In proceedings instituted for the sale of the real estate of an infant, it was alleged that his father, through whom, by descent, the infant acquired title to the property sold, was dead. A conveyance of the property was duly made in such proceedings to one Jacobson, who gave back a bond and mortgage to secure a portion of the purchase-money. This action was brought against the person to whom Jacobson had conveyed the premises, subject to the mortgage, and who had assumed the payment thereof, to foreclose the same. The defendant set up as a defense that the father was still living.

*Held*, that, as the answer failed to set up any eviction or disturbance of defendant's possession, the answer was properly stricken out as frivolous.

*PARKINSON v. JACOBSON*. . . . . 817

2. — *Implied warranty — notice of defects.*] In an action to recover the price of certain steel sold to be used in the manufacture of edged tools, the defense was that the steel was defective and of poor quality. It was admitted that the quality of the steel could not be ascertained without "working it up," and that an inspection and examination of it would not reveal its defects. *Held*, that in order to take advantage of the implied warranty that it was fit for the purpose for which it was sold the purchaser was not bound to test it at once and give notice of the defects, but that he was entitled to deduct the damages, sustained by reason of its imperfection, from the price, in an action brought to recover the latter..

*GAUTIER v. DOUGLASS MANUFACTURING Co.* . . . . . 514

3. — *Of property under chattel mortgage — no implied warranty of title arises.*] Upon a sale of property, by virtue of a chattel mortgage, the proceeding is notice to the public that the mortgagee is selling not his own title to the property, but that which he has acquired through the mortgage, and no

**SALE**— *Continued.*

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warranty of title of the property so sold is to be implied against the mortgagee.	
<b>SHEPPARD v. EARLES</b> .....	651
— <i>Contract for commissions on — construction of.</i>	
<i>See</i> <b>RUSSELL v. CONSOLIDATED FRUIT JAR CO.</b> .....	286
— <i>Of bonds procured by fraudulent representations — The measure of damages in an action therefor if the difference between the actual value of the bonds at the time of the sale and their value as they were represented to be.</i>	
<i>See</i> <b>WYETH v. MORRIS</b> .....	338
<i>See</i> <b>VENDOR AND PURCHASER.</b>	

**SAVINGS BANKS**— *Chap. 871 of 1875 — priority given to deposits made by savings bank with other banks — applies to deposits made prior to 1875, and to interest thereon.* 1. Section 48 of chapter 871 of the Laws of 1875, providing that the assets of any insolvent bank shall, after payment of its circulating notes, be applied to the payment of any sums that may have been deposited with it by any savings corporations, applies to deposits made by savings corporations prior to, as well as to those made after the passage of the said act.

An agreement was made between the New York and Erie Bank and a savings bank, by which the former agreed in consideration that the said savings bank would deposit its moneys with it, that it would pay all such deposits as had been or should thereafter be made on call, and in such sums as said savings bank might require, with six per cent interest. The president and cashier of the bank individually guaranteed the performance of the contract. Deposits were accordingly made in pursuance of said agreement, and a pass book similar to those given to ordinary depositors was given to the savings bank.

*Held*, that this was not a *loan* of the money to the bank, but a *deposit* within the meaning of that term as used in the aforesaid act.

The preference given to the deposits themselves also extends to the interest due upon them. **UPTON v. NEW YORK AND ERIE BANK** .....

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2. — *Trustees of savings bank — purchase of real estate by — when unauthorized.* [A savings bank in New York was incorporated in 1867. During the years 1867, 1868 and 1869 the expenditures exceeded the receipts; in 1870 and 1871 the receipts were in excess of the expenditures, and in 1872 and 1873 the expenditures again exceeded the receipts. In the latter year the trustees of the bank purchased four lots, three of which were sold, and on the fourth a banking-house was erected. This action was brought by a receiver of the bank against the trustees to recover damages alleged to have been sustained by the bank from such purchase, on the ground that, as the charter limited the power of the trustees to purchase real estate to a lot and banking-house, that the purchase of the four lots by the trustees when they needed but one, and the purchase of even one lot in the then condition of the bank, was an abuse of discretion, and illegal and unauthorized.]

*Held*, that the question as to whether or not the purchase of the land, considering the financial condition of the bank, was a reasonable exercise of the discretion vested in the trustees, was a question for the jury, and that it was error for the court to withdraw that question from them.

**FRENCH v. REDMAN** .....

502

— *Discount by, of a note given by an officer of — violation of its charter — what is.*

*See* **FISHER v. MURDOCK** .....

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**SCHOOL COMMISSIONER**— *Power of, to alter or divide union free school district.* 1. A School Commissioner has power, under the laws of this State, to alter or divide a Union Free School District.

**PEOPLE EX REL. BOARD OF EDUCATION v. HOOPER** .....

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2. — *Notice as to.* [An order to that effect cannot, however, be made without giving to the trustees of the district a week's notice that at a time and place specified by him he will hear their objections to the proposed alteration. *Id.*]

**SEAL**—*Contract not under, to convey land—covenant to stand seized—what consideration must exist for.*

See *LOSSEE v. ELLIS*..... 635

**SECURITY**—*On appeal by executor—failure to apply for limitation of, amount of, under Code, § 839—presumption of assets, arising from.* Although section 839 of the old Code authorized the court to dispense with or limit the security, required by sections 835, 836, 837 and 838 to be given upon an appeal, when the appellant was an executor, administrator or trustee acting in the right of another, yet when an executor without making any application to have the security limited or dispensed with gives the security in the ordinary form, the giving of such undertaking will be taken as an admission by him that he has sufficient assets applicable to the payment of the judgment appealed from, to satisfy the same. *YATES v. BURCH*..... 623

— *For future costs may be taken by attorney.*

See *HALL v. CROUSE*..... 557

**SERVICE**—*Substituted, of a summons—is not a provisional remedy under § 772 of the Code of Civil Procedure.*

See *MCCARTHY v. MCCARTHY*..... 579

**SETTLEMENT OF ISSUES**—*Discretionary with court—order directing, is not appealable.*

See *SEYMOUR v. MCKINSTRY*..... 284

**SEVERANCE**—*Of causes of action—offer to allow judgment to be taken for one of several claims—effect of, on right to sever.*

See *BRADBURY v. WINTERBOTTOM*..... 536

**SHERIFF**—*Levy by—when sufficient to sustain replevin or action for conversion.* Where a sheriff, by virtue of an execution against one Alvord, levied upon property belonging to his wife, held, that the act of the sheriff was such an exercise of dominion over it as would sustain an action for its conversion or one of replevin, although there was no actual removal of the property. That his liability was not affected by the fact that he claimed to levy upon, and in fact advertised for sale the interest of the husband alone, when the husband had, in fact, no interest therein. *ALVORD v. HAYNES*... 26

— *Neglect to enforce execution in replevin suit.*

See *HOFFMAN v. CONNER*..... 541

**SPARKS**—*Fire started by sparks from locomotive—duty of owner, as to putting out fire—contributory negligence in having combustible matter on premises.*

See *BEVIER v. DELAWARE AND HUDSON CANAL CO.*..... 254

**SPECIAL PROCEEDING**—*Review of, on certiorari—costs upon—Chap. 270 of 1854, § 3.* On an appeal to the Court of Appeals, in a proceeding brought into the Supreme Court by a common law certiorari, directed to an officer or tribunal other than a court, the successful party is not entitled to costs as a matter of course; whether or not costs shall be awarded rests in the discretion of the court. *PEOPLE EX REL. GREEN v. SMITH*..... 297

**SPECIAL SESSIONS**—*Court of—jurisdiction of—trial by jury in.*

See *PEOPLE EX REL. MURRAY v. SPECIAL SESSIONS*..... 583

**STALE DEMANDS**—*Power of court to refuse to enforce.* Although, in former times, courts of equity have refused to enforce "stale demands," yet since the adoption of the Code prescribing limitations for both legal and equitable actions no court can refuse to entertain an action on account of the staleness of the demand, provided it be brought within the time prescribed by the statute. *DERBY v. YALE*..... 273

**STATE COURT**—*Jurisdiction of—assignee in bankruptcy—actions by.*

1. This action was brought upon an undertaking given to procure the discharge from arrest of one Miller, who had been sued by the plaintiff, as an assignee in bankruptcy, to recover money collected by Miller for the bankrupt, which he had failed to pay over. Plaintiff having recovered a judg-



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ment in the first action for \$2,195.50 and taken the necessary measures to charge the bail, brought this action upon the undertaking.

*Held*, That the action was properly brought in the State court and could be maintained. *TULLIS v. MILLER* ..... 363

2. — *Legal assets or debts.*] That even if the amendment to the bankrupt act, passed in 1874, operated in any case to deprive the State courts of jurisdiction over an action brought by an assignee in bankruptcy, this case was not affected thereby, for the reason that the cause of action did not arise under the laws of the United States, and that it was not brought for the collection of the legal assets or debts of the bankrupt. *Id.*

**STATEMENTS — When they do not constitute part of the res gesta.**

*See* *TRIMMER v. TRIMMER* ..... 183

**STATUTES — Of another State, giving right of action for negligent killing — may be enforced in this State by administratrix appointed herein.] This action was brought to recover damages arising from the death of plaintiff's intestate, in the State of New Jersey, occasioned by the negligence of the defendant, a foreign corporation. At the time of the accident there was in force in the State of New Jersey a statute, similar to that of this State, giving to the personal representatives of the person killed by the negligence of any person a right of action for the damages occasioned thereby. The plaintiff was appointed administratrix by the surrogate of New York.**

*Held*, that the right of action given by the New Jersey statute could be enforced in the courts of this State by an administratrix appointed in this State. *STALLENECHT v. PENNSYLVANIA R. R. Co.* ..... 451

— 1840, chap. 277 — *Policy upon life of husband for benefit of wife — not assignable by her prior to the act of 1873, chap. 21.*

*See* *WILSON v. LAWRENCE* ..... 283

— 1845, § 115 — *filing deposition under — effect of.*

*See* *HALL v. HALL* ..... 306

— 1848, chap. 40, § 18 — *Trustees of corporation must be stockholders — how the fact that a person is a stockholder may be proved.*] Chapter 40 of 1848 requires that the trustees of the corporations created thereunder shall be stockholders of the company; defendant had signed and acknowledged the articles of association of a corporation created thereunder, and was named a trustee therein.

*Held*, in an action brought by a laborer under section 18 of said act to charge him individually with the payment for services rendered to the company, that he could not deny that he was, at the time of signing the articles, a stockholder thereof.

Where one has been shown to be a stockholder at the time of the organization of the company, he will be presumed to continue to be one until the contrary is established. *HERBES v. WESLEY* ..... 492

— 1848, chap. 40, § 25 — *Stockholder — evidence.*] Section 25 of said act providing that the book containing the names of the stockholders which the company is required to keep "shall be presumptive evidence of the facts therein stated in favor of the plaintiff in any suit against any stockholder," does not make such book the only or even the best evidence of the fact that the defendant was a stockholder. *Id.*

— 1848, chap. 40, § 11 — *Manufacturers' act — and chap. 833 of 1853 — certificate of payment of stock — must be sworn to.*] The certificate as to the payment of the capital stock of a manufacturing corporation, required to be filed by section 11 of chapter 40 of 1848, must be sworn to, and a mere acknowledgment is not a sufficient compliance with the provisions of the statute.

*BROWN v. SMITH* ..... 408

— 1848, chap. 40, § 10 — *Issue of stock for property purchased — liability of holder to creditors.*] Where, in pursuance of section 10 of the said act, as amended by the act of 1853, stock has been issued to a person for the value of a manufactory and other property which has been purchased by the company, there being no fraud in the valuation of the property, he is not liable to the creditors of the company because of a failure on the part of the president and

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a majority of the trustees to file the certificate required by section 11 of the said act. *Id.*

— 1848, chap. 40—*Corporation organized under—power of to transfer property while it has but two trustees.*

See CASTLE v. LEWIS ..... 298

— 1848, chapter 319—*proportion of estate which may be given to a corporation.*] *Semble*, that this act restricting devises and bequests to certain corporations to one-fourth of the testator's estate, and to such as are made two months before the death of the testator, is not applicable to an institution such as Manhattan College. If it were applicable, the prohibition is repealed by chapter 360 of 1860. CURRIN v. FANNING..... 458

— *Debts and dower deducted before estimating.*] *Semble*, that in determining the one-half of the estate which under the act of 1860 can be devised to charitable or educational corporations, the widow's dower and the debts are to be first deducted. *Id.*

— 1849, chap. 125, § 35, *construction of.*

See GERATTY v. REID..... 313

— 1849, chap. 352, § 3, *authorizing the commissioners of the land office to convey "lands taken for canal purposes"—authorize a conveyance of land taken for the bed of the canal when it has ceased to be used.*

See PEOPLE v. STEPHENS..... 17

— 1850, chap. 140, as amended by chap. 560 of 1871—*application for change of railroad route—the notice—must be personally served.*] The notice required by the statute (§ 22 of chap. 140 of 1850, as amended by chap. 560 of 1871) to be given on an application for a change of the proposed route of a railroad company, must be personally served.

*Quere*, whether, in a case where personal service is impracticable, the court would have power, under the seventh subdivision of section 14, to direct service to be made in some other mode.

PEOPLE EX REL. N. B. AND C. R. R. Co. v. L. AND B. R. R. Co ..... 211

— 1853, chap. 238 *relating to action for partition in case of disputed wills.*

See HALL v. HALL ..... 306

— 1853, chap. 333, *amending § 10 of chap. 40 of 1848—stock of corporation issued thereunder for property—holder not liable to creditor—though no certificate that capital stock is paid, is filed.*

See BROWN v. SMITH..... 406

— 1853, chap. 463—*a receiver of an insolvent insurance company, appointed under this act, is not entitled to have transferred to him the securities deposited by the company with the Superintendent of the Insurance Department.*

See MATTER OF GUARDIAN MUT. LIFE INS. CO..... 115

— 1854, chap. 270, § 3, *to what special proceedings and appeals it applies.*

See PEOPLE EX REL. GREEN v. SMITH ..... 227

— 1854, chap. 402, as amended by chap. 529 of 1870—*notice of lien by laborers and material-men against railroad company—what must be shown to establish lien.*] One Robertson entered into a contract with the defendant, a railroad company, to construct forty-seven miles of its road, and thereafter entered into a contract with one McGraw, by which the latter agreed to construct a portion thereof. Subsequently, McGraw having failed to pay his laborers and others who had furnished materials, the latter filed notices as provided by section 4 of chapter 402 of the Laws of 1854, as amended by section 1 of chapter 529 of 1870, and to foreclose these this action was brought against the company and McGraw. At the time the notices were filed nothing was due to McGraw.

*Held*, that as nothing was due to McGraw at the time the notices were filed, the company were not liable to pay the amounts therein set forth.

That, to render the company liable, it must also be shown that it was, at the time of the filing of the notices, indebted to Robertson on its contract with him. SAMPSON v. BUFFALO, N. Y. AND P. R. Co..... 290

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— 1857, chap. 267 — *authorizing conveyance of canal lands — not in conformity with Constitution of 1846, article 7, § 6.*

See PEOPLE v. STEPHENS ..... 17

— 1860, chap. 90 — *conveyance by married woman under — assent of husband to — effect of failure of.*] Under section 8 of chapter 90 of 1860, providing that "any married woman possessed of real estate as her separate property may bargain, sell and convey such property, and enter into any contract in reference to the same; but no such conveyance or contract shall be valid *without the assent in writing of her husband*," a conveyance by a married woman of her real estate was good as against all the world but her husband.

The assent of the husband need not be given prior to, or at the time of the delivery of the deed, but may be subsequent thereto. WING v. SCHRAMM. . . 377

— 1860, chap. 348, as amended by chap. 56 of 1875 — *general assignment — failure of assignee to give bond — effect of.*] Under the provisions of chapter 348 of 1860, as amended by chapter 56 of 1875, relating to general assignments, the failure of the assignee to enter into the bond within the time thereby prescribed does not invalidate the assignment. The statute simply prohibits him from selling the assigned property or converting it to the purposes of the trust until he shall have entered into such bond.

WORTHY v. BENHAM. .... 176

— 1860, chap. 360 — *repeals chap. 319 of 1848, restricting devises and bequests to corporations.*

See CURRIN v. FANNING .... 458

— 1861, chap. 169 — *assessment in Brooklyn.*] The provisions of section 5 of this act, directing that "no assessment on any piece or parcel of land shall exceed in amount one-half of the value thereof" is, since the passage of section 13 of chapter 633 of the Laws of 1875, no longer in force, so as to justify the reduction of an assessment in accordance therewith.

MATTER OF ADAMS. .... 355

— 1862, chap. 482 — *Extent of admiralty jurisdiction.*] Admiralty jurisdiction does not extend to contracts relating to a vessel wholly engaged in the internal commerce of a State, and no maritime lien or claim can be founded on such contracts. FRALICK v. BETTS. .... 632

— *Constitutionality of.*] Chapter 482 of 1862, providing for the collection of demands against ships and vessels is, so far as it relates to vessels wholly engaged in the internal commerce of this State, constitutional and valid. *Id.*

— *Canal boat — when a "vessel."*] A canal boat is a "vessel" within the meaning of the said law. *Id.*

— *Who may create a lien.*] The owner of a canal boat made a contract with Pierce & Son, by which the latter were to make certain repairs in and upon the boat. The repairs were made and the price to be paid therefor was paid by the owner to Pierce & Son. The plaintiff, who had been employed by Pierce & Son, to work upon the boat, not having been paid for the services rendered by him, sought to enforce his claim against the boat under the said statute.

*Held*, that he had no right so to do, as his employment by Pierce & Son gave him no right under the law of 1862 to claim a lien. *Id.*

— 1863, chap. 488 — *commissioners of estimate and assessment acting under — affidavit may be ordered heard by, after report made by them.*

See MATTER OF DEPARTMENT OF PUBLIC WORKS. .... 483

— 1870, chap. 359 — *Power of surrogate of New York under.*] Upon an application to the surrogate of New York to admit a will to probate, he has under this act power to pass upon the validity of any of the provisions of the will which shall be contested and pass upon their construction or legal effect when called in question by any of the heirs, next of kin or devisees, as amply and conclusively as the Supreme Court. CURRIN v. FANNING. .... 458

— 1870, chap. 529 — *amending chap. 402 of 1854, relating to liens of laborers*

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*and material-men against a railroad company — what must be shown to establish a lien.*

See **SAMPSON v. BUFFALO, N. Y. AND P. R. R. Co.**..... 280  
 — 1871, *chap. 560 — amending chap. 140 of 1850 — application for change of railroad route — notice thereof, must be personally served.*

See **PEOPLE EX REL. N. B., ETC., R. R. Co. v. L. AND B. R. R. Co.**... 211

— 1878, *chap. 21 — assignment of policy of insurance upon life of husband, for benefit of wife — prior to this statute void.*

See **WILSON v. LAWRENCE**..... 288

— 1878, *chap. 835, § 95 — New York city — Civil justice in.*] A civil justice of one of the District Courts in the city of New York is not "an officer of the city government or a person employed in its service" within the meaning of section 95 of chapter 835 of 1878.

**PEOPLE EX REL. PHELPS v. GENERAL SESSIONS**..... 396

— 1875, *chap. 56 — amending chap. 848 of 1860 — relating to general assignments — failure of assignee to give bond — effect of.*

See **WORTHY v. BENHAM**..... 176

— 1875, *chap. 871 — priority given to deposits made by savings bank with other banks — applies to deposits made prior to 1875, and to interest thereon.*] Section 48 of chapter 871 of the Laws of 1875, providing that the assets of any insolvent bank shall, after payment of its circulating notes, be applied to the payment of any sums that may have been deposited with it by any savings corporations, applies to deposits made by savings corporations prior to, as well as to those made after the passage of the said act.

An agreement was made between the New York and Erie Bank and a savings bank, by which the former agreed in consideration that the said savings bank would deposit its moneys with it, that it would pay all such deposits as had been or should thereafter be made on call, and in such sums as said savings bank might require, with six per cent interest. The president and cashier of the bank individually guaranteed the performance of the contract. Deposits were accordingly made in pursuance of said agreement, and a pass book similar to those given to ordinary depositors was given to the savings bank.

*Held*, that this was not a *loan* of the money to the bank, but a *deposit* within the meaning of that term as used in the aforesaid act.

The preference given to the deposits themselves also extends to the interest due upon them. **UPTON v. NEW YORK AND ERIE BANK**..... 269

— 1875 *chap. 542, changing the common law rule as to the apportionment of annuities, only applies to instruments executed or taking effect after its passage.*

See **IRVING v. RANKINE**..... 147

— 1875 *chap. 638, § 13, Local assessments.*] Since the passage of this section, the statutory remedy, by petition against void or voidable assessments for local improvements in the city of Brooklyn, is confined to that portion of any such void or voidable assessment which is in excess of the fair value of the work actually done and the materials actually furnished, and which is consequently, the result of fraud or extravagance. And it rests upon the petitioner to allege and prove the existence and amount of such excess. **MATTER OF MEAD**..... 349

— 1875, *chap. 638, § 13 — Local assessments.*] Since the passage of this section, in relation to vacating assessments in the city of Brooklyn, the provisions of section 5 of chapter 168 of 1861, directing "that no assessment on any piece or parcel of land shall exceed in amount one-half of the value thereof," is no longer in force, so as to justify the reduction of an assessment in accordance therewith. **MATTER OF ADAMS**..... 355

See **REVISED STATUTES**.

**STATUTE OF FRAUDS** — *Parol agreement as to land.*] A parol contract having the effect of giving an easement in land, though void under the statute of frauds, may inure as a license and protect a party acting thereunder from being a trespasser, and the property placed by him on the land from being deemed fixtures. **CATUGA RAILWAY v. NILES**..... 170

**STATUTE OF LIMITATIONS** — *Mutual account — between father and daughter.*] 1. A married woman claimed to recover for services rendered before her marriage, to which the statute of limitations was pleaded. To remove the bar of the statute, she proved an account in which she had charged her father with the services and credited him with various amounts, the credits being for such articles as a father would naturally give to a daughter living with him, although of age. No account was kept by the father. *Held*, that the simple presentation of an account containing such credits to the executor was not sufficient; that an account of her father against her should be regularly proved, in order to have the effect of taking the case out of the statute. *CUCK v. QUACKENBUSH*..... 107

2. — *Note — indorsements on.*] In an action upon a note, the defendant claimed that the action was barred by the statute of limitations. The note was dated March 1, 1864, payable one year after date. Upon the back of the note were indorsements of interest in the handwriting of the testatrix, dated in 1865, 1866, 1867, 1868 and 1869, and May 9, 1870. The action was commenced April 12, 1876.

*Held*, as the indorsements purported to have been made by the testatrix before the note was outlawed, they were admissible in evidence against the defendant, without proof of actual payment. *RISLEY v. WIGHTMAN*..... 168

3. — *Question for jury.*] Whether or not such payments were actually made was a question for the jury. *Id.*

4. — *Stale demands.*] Although in former times courts of equity refused to enforce stale demands, yet, since the adoption of the Code prescribing limitations for both legal and equitable actions, no court can refuse to entertain an action on account of the staleness of the demand, provided it be brought within the time prescribed by the statute. *DERBY v. YALE*.... 278

— *For limitation by contract, of time to bring action thereon.*

*See LIMITATION.*

**STENOGRAPHER** — *Fees — cannot be taxed as disbursements.*

*See PROVOST v. FARRELL*..... 308

**STOCKHOLDER** — *Chap. 40 of 1848 — trustees of corporation must be stockholders — how the fact that a person is a stockholder may be proved.*] 1. Chapter 40 of 1848 requires that the trustees of the corporation created thereunder shall be stockholders of the company; defendant had signed and acknowledged the articles of association of a corporation created thereunder, and was named a trustee therein.

*Held*, in an action brought by a laborer under section 18 of said act to charge him individually with the payment for services rendered to the company, that he could not deny that he was at the time of signing the articles a stockholder thereof.

Where one has been shown to be a stockholder at the time of the organization of the company, he will be presumed to continue to be one until the contrary is established.

Section 25 of said act providing that the book containing the names of the stockholders which the company is required to keep "shall be presumptive evidence of the facts therein stated in favor of the plaintiff in any suit against any stockholder," does not make such book the only or even the best evidence of the fact that the defendant was a stockholder.

*HERRIES v. WESLEY*..... 492

2. — *Manufacturers' act, chap. 40 of 1848, and chap. 333 of 1853 — certificate of payment of stock — must be sworn to.*] The certificate as to the payment of the capital stock of a manufacturing corporation, required to be filed by section 11 of chapter 40 of 1848, must be sworn to, and a mere acknowledgment is not a sufficient compliance with the provisions of the statute. *BROWN v. SMITH*..... 408

3. — *Issue of stock for property purchased — liability of holder to creditors.*] Where, in pursuance of section 10 of the said act, as amended by the act of 1853, stock has been issued to a person for the value of a manufactory and other property which has been purchased by the company, there being no

**STOCKHOLDER** — *Continued.*

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fraud in the valuation of the property, he is not liable to the creditors of the company because of a failure on the part of the president and a majority of the trustees to file the certificate required by section 11 of the said act. *Id.*

**STREAMS** — *Mill owners — rights of, as to the detention of the water.*

*See* BULLARD v. SARATOGA VICTORY MANUFACTURING CO. .... 48

**STREETS:**

*See* HIGHWAYS.

**SUBSCRIPTION** — *For making fair grounds — destruction of grounds — right of action accruing to subscriber.*] 1. The plaintiff and others signed a paper whereby they promised and agreed to pay to the defendant the sum set opposite their names, such subscription being for the purpose of defraying the expenses of grading, fencing, etc., a fair ground upon land belonging to defendant. The instrument provided that the subscribers should, when the net receipts of the grounds amounted to the sum subscribed by each, receive back in full the amount subscribed. Thereafter, the plaintiff paid fifty dollars to defendant, and received from him a receipt, entitling plaintiff to the privilege of driving upon the track at all times, unless the amount so subscribed was repaid.

Defendant subsequently ploughed up and planted trees on the track, and constructed another one at a different place on his farm. In an action by the plaintiff to recover the amount paid by him, *held*, that it was not necessary for all the subscribers to join in the action, but that each might maintain a separate action. HORTON v. HOWE ..... 57

2. — *Damages.*] That it was not necessary for the plaintiff to prove any special damage sustained by the breaking up of the track, but that he was entitled, in view of the fact that the sum was to be paid to him out of the net receipts of the grounds, to recover the full amount of his subscription. *Id.*

**SUBSTITUTION** — *Right of surety paying claim against bankrupt, to be substituted.*

*See* MILLER v. O'KAIN ..... 394

**SUMMARY PROCEEDINGS** — *What defense may be set up by tenant — That lease was in fact a mortgage — that it was void for usury — how proved.*] In summary proceedings instituted to remove the relator from certain premises, on the ground that he was holding over after the expiration of his term, he made an affidavit stating that on the day on which the respondent alleged that the lease was made he executed and delivered to the respondent an absolute deed of the premises, and he and the respondent executed an agreement by which he agreed to buy the premises for a price therein named, to be paid on the day the lease expired, and also executed the lease upon which the proceedings were instituted; that said instruments were all given at the same time to secure the repayment of a sum of money loaned to him by the respondent, and were in fact a mortgage; that upon the said loan usurious interest was reserved, the payment of which was secured by the said lease.

*Held*, that it was competent for the relator to establish in such proceedings that the instrument purporting to create the relation of landlord and tenant between himself and the respondent was in fact a mortgage to secure the repayment of a loan.

That it was also competent to show that such instrument was given to secure a usurious loan, and was therefore void.

That the establishment of either of these facts would require the proceedings to be decided in his favor.

*Semble*, that in summary proceedings it would not be competent to establish by parol evidence that a deed absolute upon its face was intended as a mortgage.

Where, however, the affidavit does not specify the kind of evidence by which it is expected to establish this fact, it must be presumed that it will be proved by competent evidence. PEOPLE EX REL. AINSLEE v. HOWLETT, 138

**SUMMING UP** — *The right to close the case.*

*See* DEGRAFF v. CARMICHAEL ..... 139

**SUMMONS** — *Served upon corporation — "managing agent" of — who is.* One Treat, the president and superintendent of a street railway in Auburn, was, on June 1, 1876, employed by the president of the defendant, a steam railroad company, to superintend the running of horse cars on a portion of defendant's road not yet completed. Treat had no authority to make contracts for the defendant, except to purchase horses and feed; nor had he any control over or knowledge of the affairs of the defendant, or its books; his employment was to continue during the president's pleasure.

*Held*, that a summons, in an action against the defendant, could not be served upon him as its "managing agent."

EMERSON v. AUBURN AND OWASCO LAKE R. R. .... 150

— *Order authorizing a substituted or constructive service of — is not a provisional remedy under § 772 of the Code of Civil Procedure.*

See MCCARTHY v. MCCARTHY. .... 579

**SUPPLEMENTARY PROCEEDINGS** — *Code, § 292.* In order to authorize the making of an order before execution returned requiring a judgment debtor, who has property which he unjustly refuses to apply to the payment of the judgment, to appear and be examined, it should be shown that a demand has been made upon the debtor to apply his property to the satisfaction of the judgment, and has been refused by him.

FIRST NATIONAL BANK v. WILSON. .... 232

**SUPPORT :**

See MAINTENANCE AND SUPPORT.

**SURETY** — *Note — addition of word "surety" to name of one joint maker — action how brought thereon.* Where two persons execute a note and one of them adds to his signature the word "surety" both are to be treated as makers of the note and may be joined as defendants in an action upon it; nor is the liability of the surety to the holder of the note affected by any equities existing between such surety and his co-defendant. HOYT v. MEAD, 327

2. — *Upon collector's bond — rights of.* A bank collected the rents of certain real estate in Watertown as the agent of the owners, George F. Paddock, Oscar Paddock and Edwin L. Paddock, from December 8, 1874, to October 29, 1875. On the former date Blood, Sawyer and George F. Paddock signed as sureties the bond of one Rogers, as collector of the town of Watertown, which bond was duly filed. Rogers failed to pay over the sum of \$11,348.68 of the taxes collected by him, but deposited it with a firm of bankers, of which George F. Paddock was a member, which firm converted the money to its own use and then became bankrupt. On October 29, 1875, Paddock's interest in the real estate was sold under a judgment recovered in an action brought by the supervisors upon the bond, the proceeds thereof being insufficient to pay the amount of the judgment for which the other sureties were liable. This judgment directed that the real property of Paddock should be first sold thereunder, before resorting to the property of his co-obligors.

In an action by the assignees in bankruptcy of the firm to recover from the bank the bankrupts' interest in the rents collected by it, the other sureties claimed that as between them and Paddock, the latter was primarily liable for the moneys converted by his firm, and that they could avail themselves, in equity, of the lien of the bond on his real estate; and that he being insolvent, and his real estate being inadequate security, they could reach the rents by means of a receiver, in the same manner that a mortgagee could under like circumstances. *Held*, that this claim could not be sustained and that the assignee was entitled to the money.

*Semble*, that the lien created by the filing of a collector's bond is analogous to that of a judgment creditor, and not to that of a mortgagee; and the owner of the property has a right to redeem and a right to the possession, and to receive the rents and profits after a sale thereunder, the same as after a sale under an ordinary judgment. UPHAM v. PADDOCK. .... 571

See PRINCIPAL AND SURETY.

**SURROGATE** — *Of New York — power to construe wills — chap 359 of 1870.*]

1. A testator devised certain real estate to the trustees of Manhattan College, in the city of New York, and their successors forever, in trust to receive the rents, etc., and to apply the same to the use of said Manhattan College for the following purposes, to wit, to found and maintain a Latin professorship. The foregoing devise was made to the trustees on the express condition that out of the rents, etc., the said trustees and their successors should pay to the testator's wife an annuity of \$1,500 per annum, and authorized them, after the death of the wife, to sell and reinvest the proceeds, the income to be applied to the maintenance of the professorship.

Upon an application to the surrogate of New York to admit the will to probate, *held*, that under chapter 359 of 1870 the surrogate of New York had power to pass upon the validity of any of the provisions of said will which should be contested, and pass upon their construction or legal effect when called in question by any of the heirs, next of kin, legatees or devisees as amply and conclusively as the Supreme Court might do.

That such jurisdiction should not be exercised, except so far as it might be necessary for the purpose of passing upon the probate of a will, until all the parties in interest were brought into court. *CURRIN v FANNING*..... 458

2. — *Devise to corporation.*] That the devise of the real estate was, in legal effect, to the Manhattan College and not to the trustees as individuals. *Id.*

3. — *Power to hold in trust.*] That the college being capable of taking real estate by devise was authorized to take the property, although charged with a subordinate trust in favor of the widow of the testator. *Id.*

4. — *Proportion of estate which may be given to a corporation.*] *Semble*, that the act (chap. 319 of 1848) restricting devises and bequests to certain corporations to one-fourth of the testator's estate, and to such as are made two months before the death of the testator, is not applicable to an institution such as Manhattan College. If it were applicable, the prohibition is repealed by chapter 360 of 1860. *Id.*

5. — *Debts and dower, deducted before estimating.*] *Semble*, that in determining the one-half of the estate which under the act of 1860 can be devised to charitable or educational corporations, the widow's dower and the debts are to be first deducted. *Id.*

6. — *Jurisdiction of, over disputed claims.*] A surrogate has no jurisdiction upon a final accounting to hear and determine the validity of a disputed claim against the estate of a deceased person.

Where, upon a final accounting, the executrix presents an account in which is contained an item for money paid by her to a creditor, in settlement of a claim against the estate, which item is objected to and attacked by her co-executor and by the other persons interested in the estate, the surrogate has no jurisdiction to determine as to the validity of the same, or to refer the same to an auditor. *BOUGHTON v. FLINT*..... 206

— *Legacy — application for a portion of, for the support of the legatee — what must be shown to authorize the order — Bond — form of.*

*See BARNES v. BARNES*..... 233

**SURVEY** — *Of highway — must be incorporated into the order to be signed by the commissioners and filed.* (2 R. S. [5th ed.], § 70.)

*See PRATT v. PEOPLE*..... 664

**TAXATION :**

*See COSTS.*

**TAXES** — *In New York — when they become a lien — covenant for payment of.*]

On March 30, 1875, certain premises in the city of New York were leased to the defendant for ten years from May 1, 1875, the latter agreeing, during the term of the lease, to pay and discharge all such assessments, extraordinary as well as ordinary, as should be levied, assessed, imposed or grow due and payable upon, out of or for the demised premises, and all parts thereof.

In New York the assessment rolls are open for examination from the second Monday in January to April thirtieth, and are returned to the board



**TAXES** — *Continued.*

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of supervisors on the first Monday of July in each year, and the amount of the tax is thereafter set down opposite to the items of real and personal property on the list. *Held*, that the tax for the year 1875 grew due and became payable after the commencement of the term, and that the defendant was bound to pay the same. *SKIDMORE v. HART*..... 441

**TAX SALE** — *Liability of county for negligence of county treasurer in failing to serve notice to redeem on tax sale.*

*See* DE GRAUW v. SUPERVISORS OF QUEENS COUNTY..... 881

**TENANT:**

*See* LANDLORD AND TENANT.

**TENDER** — *Contract for sale of lands — note given upon signing contract — in an action upon the note plaintiff must prove performance of the contract.]*

1. On November 15, 1875, the parties to this action entered into an agreement, whereby the plaintiff agreed to sell certain land to the defendant, and to deliver the deed on December fifteenth, the defendant to pay on that day a note for \$500, given when the contract was signed, and \$3,300 in cash, being the balance of the purchase-money.

In an action by the plaintiff upon the note, given at the time of the signing of the contract, *held*, that it rested upon her to prove a performance or tender of performance of the contract upon her part, and that, failing so to do, she was not entitled to recover. *HOAG v. PARR*..... 95

2. — *Where no place is designated.]* There being no place specified in the contract for the delivery of the deed and the payment of the money, and the defendant being a resident of this State, the plaintiff was bound to find the defendant and make a tender to him personally, or at least to show that after thorough efforts and inquiries he was unable to find him. *Id.*

8. — *Excuse for neglect to make.]* In order to excuse a personal tender, it must appear that the defendant was out of the State, beyond plaintiff's reach, or else that he intentionally avoided him or kept out of his way. *Id.*

**TICKET:**

*See* RAILROAD.

**TIME** — *in pleading — allegations in pleading relate to time of commencement of action.*

*See* PORTER v. KINGSBURY..... 88

**TITLE** — *To real estate.]* A conveyance of her real estate by a married woman, without the assent of her husband, is good as against all the world but her husband. The assent provided for in section 3 of chapter 90, Laws of 1860, need not be given prior to, or at the time of the delivery of the deed, but may be subsequent thereto. *WING v. SCHRAMM*..... 377

— *Cloud upon — action in equity to remove — when not maintainable — remedy by ejectment.*

*See* BOCKES v. LANSING..... 88

— *No warranty of, implied on sale of property under chattel mortgage.*

*See* SHEPPARD v. EARLES..... 651

**TOWN BONDS** — *Proceedings for bonding towns — commissioners to issue bonds — annulling of proceedings — effect of, on powers of commissioners.]* On July 1, 1871, the county judge of Jefferson county, in proceedings instituted before him, under chapter 907 of 1869 and chapter 925 of 1871, appointed commissioners to issue bonds in aid of the construction of a railroad. The proceedings were removed by *certiorari* to this court, and on July 1, 1872, a judgment was entered affirming them. On February 24, 1873, the Court of Appeals reversed the judgment and directed the county judge to dismiss the application. After the issuing of the *certiorari*, the commissioners issued bonds to the amount of \$80,000 and delivered them to the plaintiff, the agent and treasurer of the railroad company, who delivered in exchange therefor the stock of the company. Both the plaintiff and the commissioners knew of the pendency of the *certiorari*. The money necessary to pay the interest

**TOWN BONDS** — *Continued.*

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on the bonds for a certain time had been levied and received by the collector. In this action, brought to recover the amount of certain coupons attached to the bonds, the money to pay which had been collected, the plaintiff produced an instrument signed by the persons appointed commissioners, reciting their appointment, and the fact that the proceedings had been declared void, and transferring to plaintiff all their right to the bonds as commissioners or otherwise.

*Held*, that the money having been collected for the specific purpose of paying the coupons, that if it was the duty of the defendant to pay it over to the holders of the coupons, he could not set up the invalidity and reversal of the proceedings before the county judge as a reason for not doing so.

That it was, in fact, his duty to pay the commissioners, and not the holders of the coupons.

That the commissioners had no right to, or interest in the fund except as commissioners, and while continuing to hold the office, and that they could not transfer their official rights or divest themselves of their official duty.

That immediately upon the decision of the Court of Appeals, they ceased to be such commissioners and to have any interest whatever in the fund.

That nothing passed to the plaintiff by the pretended transfer, and that plaintiff could not recover. *BIDDLECOM v. NEWTON*. . . . . 582

*Semble*, that where exceptions are taken during the trial, the direction of a verdict, subject to the opinion of the court, is error; that the consent thereto is a waiver of the exceptions. *Id.*

**TREASURER** — *Of county — liability of county for negligence of, in failing to serve notice to redeem on tax sales.*

*See* DE GRAUW v. SUPERVISORS OF QUEENS CO. . . . . 381

**TRESPASS** — *Parol agreement protects party acting hereunder.*] A parol contract having the effect of giving an easement in land though void under the statute of frauds, may yet be valid as a license and protect a party acting thereunder from being guilty of a trespass. *CAYUGA RAILWAY CO. v. MILES*, 170

— *When temporary injunction granted to restrain.*

*See* JOHNSON v. CITY OF ROCHESTER. . . . . 285

**TRESPASSING ANIMALS** — *Animals trespassing on lands of person, other than their owner — rights of owner of land to drive them off with dogs.*

*See* SMITH v. WALDORF. . . . . 127

**TRIAL** — *Question arising upon — can only be reviewed upon a case settled — form of judgment in replevin.*] No question, either of fact or of law, arising upon a trial — *e. g.*, an objection that a judgment in replevin is for money only, instead of for a return of the property or for its value, in case of its non-delivery, can be reviewed upon appeal, except upon a case made and settled according to the established practice. *MCLEAN v. COLE*. . . . . 300

— *Settlement of issues — discretionary — order directing, not appealable.*

*See* SEYMOUR v. MCKINSTRY. . . . . 284

— *Refusal of party to produce paper on — contempt — striking out of complaint.*

*See* SHELF v. MORRISON. . . . . 110

— *The right to close the case.*

*See* DE GRAFF v. CARMICHAEL. . . . . 139

— *Excessive damages — setting aside of verdict because of.*

*See* GALE v. N. Y. CENTRAL AND H. R. R. R. CO. . . . . 1

**TRUST** — *Assignment of property, in consideration of a covenant by the assignee to support the assignor — does not constitute a trust.*] 1. This action was brought by the plaintiff, as receiver of one C., appointed in proceedings supplementary to an execution issued upon a judgment recovered against the latter. After the creation of the debt upon which the judgment was recovered, C. entered into a written agreement with one S., his son-in-law, by which he conveyed to S. all his personal property and a contract for the purchase of land, amounting, in all, in value, to about \$2,100; and S. agreed,

**TRUST** — *Continued.*

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in consideration thereof to support the said C. during his life, and his minor son until he attained the age of sixteen years, and to send the latter to a common school.

In this action, brought by plaintiff to annul the transfer, sell the property and pay the debt from the avails, the court held that the transfer was, in fact, an assignment of said property in trust for the use of C., and such trust was void as against the creditors of the latter. *Held*, that this was error.

HUNGERFORD v. CARTWRIGHT ..... 647

2. — *May be held by corporation — when.*] A testator devised certain real estate to the trustees of Manhattan College in the city of New York and their successors forever: in trust to receive the rents, etc., and to apply the same to the use of said college to found and maintain a Latin professorship. The devise being made to the trustees on the express condition that out of the rents, etc., the said trustees and their successors should pay to the testator's widow an annuity of \$1,500 a year, and after the death of the wife, to sell and reinvest the proceeds, the income to be applied to the maintenance of the professorship; *held*, that the college being capable of taking real estate by devise was authorized to take the property, although charged with a subordinate trust in favor of the widow of the testator. CURRIN v. FANNING .. 462

**TRUSTEE** — *Of corporation under chap. 40 of 1848, must be a stockholder — how the fact that a person is a stockholder may be proved.*

See HERRIES v. WESLEY ..... 492

— *Of insolvent debtor — reference of claims by — procedure on application for — 3 R. S. [6 ed.], 39, §§ 21, 22.*

See WICKHAM v. FRAZEE ..... 481

— *Of savings bank — purchase of real estate by — when unauthorized.*

See FRENCH v. REDMAN ..... 502

**TRUST ESTATE** — *Purchaser of, with knowledge of the trust — liabilities of.*

A purchaser of a trust estate, with knowledge of the trust, is subject to all the duties in respect to the same which rested upon the trustee from whom he purchased. GAUTIER v. DOUGLASS MFG. Co ..... 514

**UNION FREE SCHOOL DISTRICT** — *Power of school commissioner to alter or divide.*] 1. A school commissioner has power, under the laws of this State, to alter or divide a Union free school district.

PEOPLE EX REL. BOARD OF EDUCATION v. HOOPER ..... 639

2. — *Notice as to.*] An order to that effect cannot, however, be made without giving to the trustees of the district a week's notice that at a time and place specified by him he will hear their objections to the proposed alteration. *Id.*

**UNITED STATES COURT** — *Removal of action to.*] To authorize the removal of an action from a State court to a Federal court it is not sufficient that it is alleged that the defendant was an alien, a citizen or subject of a foreign State or country at the time the petition for such removal was prepared, but it must appear that such was the fact at the time of the commencement of the action. TUGMAN v. NATIONAL STEAMSHIP Co. .... 882

— *Jurisdiction of — over actions brought by assignees in bankruptcy.*

See TULLIS v. MILLER ..... 868

**UNOCCUPIED** — *Meaning of, in policy of insurance.*] 1. A policy of insurance issued upon a dwelling-house provided that if it should cease to be occupied by the owner or occupant in the usual and ordinary manner in which dwelling-houses are occupied as such, the policy should become void. The house was occupied by a tenant, who, on March fifteenth, commenced to move out, and removed most of his furniture and all of his family from the house. No person was left in it, and on the night of the sixteenth it was destroyed by fire.

*Held*, that the question whether or not the house was unoccupied at the time of the fire, within the meaning of that term as used in the policy, was properly left to the jury. WAIT v. AGRICULTURAL INS. Co. .... 371

**UNOCCUPIED** — *Continued.*

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2. — *In policy of insurance.*] A policy of insurance provided that, "if the premises should become unoccupied without the consent of the company indorsed thereon, then and in every such case the policy should be void." The plaintiff had for some time before the fire, slept in the adjoining house, which belonged to her daughter, but had never abandoned the premises; her furniture and wearing apparel remaining there, and she returning and spending the day there.

*Held*, that the house was not unoccupied within the meaning of the condition. **GIBBS v. CONTINENTAL INS. CO.** ..... 611

**USURY** — *Contract — by what law governed.*] 1. The defendant signed and delivered at the city of New York a promissory note, dated at that place, whereby, three months from its date, he promised to pay to the order of B. & G. \$300 at the New York National Exchange Bank. The note was made solely for the accommodation of the payees. The note was sold in Boston Massachusetts, by the payees at a rate of discount usurious under the laws of this State.

In an action by the plaintiff, to whom it had been transferred by the purchaser, *held*, that the question of usury was governed by the laws of this State and that the note was void. **DICKINSON v. EDWARDS.** ..... 406

2. — *Contract — by what laws to be governed.*] W., a resident of Connecticut, drew, in that State, a draft upon the defendant, a resident of New York, directed to him at his place of business in New York, and the same was accepted by him, payable in New York, solely for the accommodation of the drawer, and returned to W., in Connecticut, with the expectation that it would be negotiated in that State. W. discounted the draft in Connecticut at the rate of three per cent per month.

In an action upon the draft brought in this State, *held*, that as the draft had no existence as a contract until discounted in Connecticut, and as the acceptor understood that it was to be used in that State, the acceptance must be regarded as a Connecticut contract; that the question of usury and its effect upon the validity of the draft was to be governed by the laws of Connecticut, and not by the laws of New York, and that the mere fact that the paper was payable in this State did not render it subject to our law as to usury. **OPDYKE v. MERWIN.** ..... 401

3. — *In bonds and mortgages — by whom, after conveyance of the mortgaged property, it may be set up.*] One Nelson, on October 13, 1874, in pursuance of an usurious agreement entered into between himself and the plaintiff, executed and delivered to it four bonds and mortgages. On February 19, 1875, he conveyed the property covered thereby to one L., subject to the mortgages. On March 15, 1875, L. conveyed the same, subject to the mortgages, to W., who, on March 23, 1876, reconveyed the premises to Nelson, the conveyance not being stated to be subject to the mortgages.

In an action brought to foreclose the mortgages, *held*, that Nelson, being the "borrower," and the mortgages being liens only upon his own property, was entitled to set up the defense of usury and have the bonds and the mortgages collateral thereto declared null and void.

*Quere*, whether, if any of the intermediate grantees of the property had become bound for the payment of the bond and mortgage, the mortgage might not be considered as collateral security for that liability, and enforceable with it. **KNICKERBOCKER LIFE INS. CO. v. NELSON.** ..... 321

— *Action by devise of mortgagor, to set aside a mortgage on the ground of — plaintiff must first offer to pay the amount loaned to his ancestor.*

*See* **MARSH v. HOUSE.** ..... 126

— *Summary proceedings — what defense may be set up by tenant — that lease was in fact a mortgage — that it was void for usury — how proved.*

*See* **PEOPLE EX REL. AINSLEE v. HOWLETT.** ..... 188

**VENDOR AND PURCHASER** — *Of trust estate with knowledge of the trust — liabilities of.*] 1. A purchaser of a trust estate, with knowledge of the trust, is subject to all the duties in respect to the same which rested upon the trustee from whom he purchased. **GAUTIER v. DOUGLASS MANUFACTURING CO.** 514

**VENDOR AND PURCHASER** — *Continued.*

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2. — *Purchase by agent of demand against principal — upon what terms Court of Equity will set it aside.*] Thomas O'Grady and wife executed a bond and mortgage to one W., who thereafter assigned the same to a son of the said Thomas, who assigned it to one Doyle, who assigned it to the son's wife, the plaintiff herein. The last two assignments were without consideration. At the time of the purchase of the mortgage by the son, he was acting as confidential agent of his father. In an action to foreclose the mortgage, the referee held that the confidential relations existing between the father and son prevented the latter from purchasing the mortgage, and that the assignment to him was void.

*Held*, that this was error; that at law the assignment vested the legal title in the son, and that equity would not allow the title so acquired to be taken from his assignee except upon the payment of the amount expended in purchasing the same. *O'GRADY v. COE*. . . . . 598

— *Insurance on interest of purchaser of land under contract of sale — in possession and in default under such contract — not affected by such default where contract is avoidable therefor, at the election of vendor, and such right has not been exercised.*

*See PELTON v. WESTCHESTER FIRE INS. CO.* . . . . . 28

— *Contract for sale of lands — note given upon signing contract — in an action upon the note plaintiff must prove performance of the contract — Tender.*

*See HOAG v. PARR.* . . . . . 95

**VENUE** — *Public officer — action against — where triable.*] The warden of the city prison, in New York, is a public officer, and an action brought to recover damages for an act done by him in virtue of his office, must be tried in the county of New York. *COWEN v. QUINN*. . . . . 844

**VERDICT** — *Court of General Sessions — absence of two justices — power of county judge to receive a verdict.*

*See HINMAN v. PEOPLE* . . . . . 266

— *Refusal to set aside on the ground of excessive damages. — Refusal to set aside on account of alleged misconduct of juror, the same having been known on the trial and waived.*

*See GALE v. N. Y. C. AND H. R. R. CO.* . . . . . 1

— *Pro-forma verdict.*] The practice of directing a *pro-forma* verdict at Circuit, and reserving the cause for further argument and consideration to be had on a motion made on the judge's minutes to set aside the verdict, and on the hearing of such motion directing judgment. in favor of the party entitled thereto, approved. *HALL v. HALL* . . . . . 306

**VERIFICATION** — *Of answer defective — return of answer therefor — notice must point out defect.*

*See SNAPE v. GILBERT.* . . . . . 494

**VESSEL** — *A canal boat is a vessel, within the meaning of chap. 482 of the Laws of 1862.*

*See FRALICK v. BETTS.* . . . . . 682

**VILLAGES:**

*See MUNICIPAL CORPORATIONS.*

**VIRTUTE OFFICII** — *Action brought against public officer for act done virtute officii — where triable — who is a public officer.*

*See COWEN v. QUINN.* . . . . . 344

**VOLUNTARY APPEARANCE** — *When sufficient — waiver of process.*]

1. The want of process to bring a defendant into court may be waived by a voluntary appearance in the action; but to be effectual, such appearance must be with knowledge that there is an action pending and with a full intention to appear therein. *MERKEE v. CITY OF ROCHESTER* . . . . . 157

2. — *Presence in court — not.*] The mere presence of a defendant in a court room does not authorize a magistrate to proceed and render a judgment against him, unless he notify him that an action is pending against him and unless he fully understands the nature of the proceedings. *Id.*

**WAIVER**—*Of misconduct of juror—refusal to set aside verdict.*] 1. During a trial, the court having adjourned, one of the jurors, who lived twelve miles from the court-house, asked the plaintiff to let him ride home with him. The plaintiff assented and the juror rode with him about ten miles, in a three-seated sleigh, plaintiff and the driver on the front seat, two other persons on the middle seat and the juror and another person on the back seat. Nothing was said about the trial. Subsequently, and before the testimony had been closed, the defendant's counsel became acquainted with these facts, whereupon plaintiff's counsel offered to allow this juror to be excused, if defendant's counsel so desired. Defendant's counsel stated he was willing to leave it to the juror's sense of propriety whether he should or should not remain in the jury-box. *Held*, that even if the irregularity would, in any event, have justified the setting aside of the verdict, the acts and statements of the defendant's counsel constituted a waiver thereof.

GALE v. N. Y. CENTRAL AND H. R. R. Co ..... 1

2. — *Of condition in policy of insurance to refer amount of loss to arbitration.*] A defendant, by its answer, denied its liability for any part of the loss under an insurance policy which provided for an arbitration in case of disagreement as to amount of loss, on grounds specifically stated therein. *Held*, that it thereby waived the condition requiring an arbitration, as the amount of the loss was immaterial, if the company insisted that it was not liable for any portion thereof. GIBBS v. CONTINENTAL INS. Co. .... 611

— *Agent of insurance company—power of, to waive conditions of insurance policy—what constitutes a waiver.*

See WHITED v. GERMANIA FIRE INS. Co., ..... 191

**WARRANTY**—*Of title—none implied on sale of property under a chattel mortgage.*] 1. The proceeding is notice to the public that the mortgagee is selling not his own title to the property, but that which he has acquired through the mortgage, and no warranty of the title to the property so sold is to be implied against the mortgagee. SHEPPARD v. EARLES ..... 651

2. — *On sale of goods—notice of defects.*] In an action to recover the price of certain steel sold to be used in the manufacture of edged tools, the defense was that the steel was defective and of poor quality. It was admitted that the quality of the steel could not be ascertained without "working it up," and that an inspection and examination of it would not reveal its defects. *Held*, that in order to take advantage of the implied warranty that it was fit for the purpose for which it was sold, the purchaser was not bound to test it at once and give notice of the defects, but that he was entitled to deduct the damages, sustained by reason of its imperfection, from the price, in an action brought to recover the latter

GAUTIER v. DOUGLASS MANUFACTURING Co. .... 514

**WATER**—*Detention of—rights of one mill owner to—as against other mill owners lower down on same stream.*

See BULLARD v. SARATOGA VICTORY MANUFACTURING Co. .... 48

**WAY**—*Right of—owner of the easement may repair the way.*

See McMILLEN v. CRONIN ..... 68

## WIFE:

See HUSBAND AND WIFE.

**WILL**—*Power of surrogate of New York to construe.*] 1. A testator devised certain real estate to the trustees of Manhattan College, in the city of New York, and their successors forever, in trust to receive the rents, etc., and to apply the same to the use of said Manhattan College for the following purposes, to wit, to found and maintain a Latin professorship. The foregoing devise was made to the trustees on the express condition that out of the rents, etc., the said trustees and their successors should pay to the testator's wife an annuity of \$1,500 per annum, and authorized them, after the death of the wife, to sell and reinvest the proceeds, the income to be applied to the maintenance of the professorship.

Upon an application to the surrogate of New York to admit the will to

**WILL** — *Continued.*

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probate, *held*, that under chapter 859 of 1870 the surrogate of New York had power to pass upon the validity of any of the provisions of said will which should be contested, and pass upon their construction or legal effect when called in question by any of the heirs, next of kin, legatees or devisees as amply and conclusively as the Supreme Court might do.

That such jurisdiction should not be exercised, except so far as it might be necessary for the purpose of passing upon the probate of a will, until all the parties in interest were brought into court. *CURREN v. FANNING*... 458

2. — *Legacy — when payable — interest thereon.*] Where a legacy is payable out of a particular fund which is not available for that purpose until a certain contingency happens, *e. g.*, the death of a tenant for life, such legacy will, in the absence of special circumstances or of a provision of the will prescribing a different time of payment, be payable at, and will bear interest from the happening of the contingency, and not from the death of the testator. *WHEELER v. RUTHVEN*... 580

— *Legacy — application for a portion of, for the support of the legatee — what must be shown to authorize the order.*  
*See BARNES v. BARNES*... 288

— *Annuity — apportionment of — chap. 542 of 1875 — application of.*  
*See IRVING v. RANKINE*... 147

— *Legacies — when they are charged upon land — liability of residuary legatees for payment of.*  
*See STODDARD v. JOHNSON*... 606

**WITNESS** — *Impeachment of — when prior declaration of witness may be proved, for the purpose of sustaining his testimony.*] 1. In this action, brought for a partnership accounting, the defendant claimed that the accounts had been settled by an accord and satisfaction. The parties themselves were the principal witnesses and gave contradictory evidence. The defendant to impeach plaintiff's testimony denying the settlement, gave evidence to show that at the time of the settlement, plaintiff thought that defendant's father, a man of wealth, intended to leave his property to defendant in trust and not absolutely; and that subsequently, upon learning that the property was left to defendant absolutely, so that defendant was pecuniarily responsible, he denied the settlement. Upon the trial the plaintiff offered to prove by a witness that he had denied that any settlement had been made before he knew the contents of the will of defendant's father.

*Held*, that the evidence was proper as tending to show that the plaintiff had denied the settlement, at a time when he could not have been impelled so to do by a knowledge of the change in defendant's pecuniary condition.

Where an attempt is made to discredit a witness on the ground that when his testimony is given his interests prompt him to make a false statement, he may show that he made similar statements at a time when he had no advantage to derive from so doing. *HERRICK v. SMITH*... 446

2. — *Contradiction of — when allowed.*] A witness may be contradicted not only as to his testimony in chief, but also as to matters drawn out on his cross-examination, material to the issue, especially when the contradictory statements tend to discredit, vary, modify or explain the testimony given by him on his direct-examination. *GREENFIELD v. PEOPLE*... 242

3. — *Challenges — review of decision as to.*] In reviewing the decision of a trial court upon a challenge to the favor, the appellate court has the power, and it is its duty, to pass upon the facts *de novo*, from the evidence adduced before the court below. *Id.*

4. — *Evidence upon.*] Since the passage of the act of 1873, by which challenges both for principal cause and for favor are to be tried by the court it is not necessary to reiterate, upon the challenge for favor, the evidence taken upon a challenge for principal cause on the same ground; but the court is to decide upon the testimony given on both challenges. *Id.*

5. — *Impression as to guilt — when it does not render a juror incompetent.*] Where, upon a challenge for favor, it appeared that the person challenged had a preconceived impression as to the guilt of the accused, based upon

**WITNESS** — *Continued.*

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statements which he had read in an account of a former trial, which statements might or might not be supported by the evidence, but he believed he could, if sitting as a juror, render a fair and impartial verdict on the evidence, notwithstanding such impression, *held*, that the challenge was properly overruled. *Id.*

6. — *Impeaching character of—rebutting testimony—what admissible as.*] Upon the trial of an action for assault and battery, the defendant having called several witnesses who testified to the bad character of the plaintiff, a milliner, who had testified in her own behalf, she was recalled and asked: "How was it as to the better class of ladies in the village patronizing you up to that time?"

*Held*, that the question was improper, and that the court erred in allowing it to be put and answered against the objection and exception of defendant's counsel. *HAGADORN v. KEARNEY* ..... 286

7. — § 399 of Code—"assignee"—meaning of—*what witnesses excluded by.*] An action was brought upon a promissory note made by the defendant Warner, to the order of and indorsed by one Ayer, and subsequently indorsed by one Alexander, and by him transferred to the plaintiff. Alexander died before the trial. The signatures of the maker and indorsers were proved. Ayer was called by the defendants, the legal representatives of Warner, and against plaintiff's objection and exception allowed to testify as to a personal transaction between himself and Alexander, tending to establish the defense of usury.

*Held*, that Richardson was an "assignee" of Alexander, within the meaning of section 399 of the Code.

That Ayer was a person "from, through or under whom" Richardson derived title within the meaning of that section.

That the fact that the defendants, the legal representatives of Warner, by whom Ayer was called, did not derive title from him, did not render him competent.

That the evidence should have been excluded. *RICHARDSON v. WARNER*, 18

8. — *Sec. 829 of the Code of Civil Procedure.*] Under section 829 of the Code of Civil Procedure, which is the substitute for section 399 of the old Code, the witness would have been competent, as by that section the witness is only prohibited from being examined in his own behalf or interest, or in behalf of the party succeeding to his title or interest. *Id.*

**WORDS** — *Submission of meaning of, to jury.*] To the question in the application, "Is the party subject to dyspepsia, dysentery or diarrhoea?" D. answered "No." Upon the trial the court charged the jury: "You will say what is the fair meaning of the words 'subject to.' Does it mean a single occurrence of a disease—a single attack—or does it mean that one has been habitually attacked, or that he is under the possession of the disease? \* \* \* Looking at this question, it is for you to say whether he was subject to dyspepsia, dysentery or diarrhoea." *Held*, that, as submitted, there was no error in allowing the jury to determine the meaning of the words "subject to." *EDINGTON v. AETNA LIFE INS. CO.* ..... 548

**WRONG-DOER** — *No presumption indulged in favor of.*

*See OUTHOUSE v. OUTHOUSE* ..... 180

*Ex. L. U. A.*



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